Country report non-discrimination. The Netherlands 2020

de Vries, Karin

2020

DOI (link to publisher)
10.2838/086308

document version
Publisher's PDF, also known as Version of record

European Commission

European network of legal experts in gender equality and non-discrimination

Country report

Non-discrimination

Netherlands

2020

including summary

Justice and Consumers

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality and Union citizenship
Unit D.1 Non-discrimination and Roma coordination

European Commission
B-1049 Brussels

EUROPEAN COMMISSION

Country report
Non-discrimination

Transposition and implementation at national level of Council Directives 2000/43 and 2000/78

Netherlands

Karin de Vries*

Reporting period 1 January 2019 – 31 December 2019

2020 Directorate-General for Justice and Consumers

* The author has gratefully built on the reports written until 2016 by the previous expert Rikki Holtmaat, and until 2019 by Titia Loenen.

Europe Direct is a service to help you find answers to your questions about the European Union.

Freephone number (*)**:**

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Luxembourg: Publications Office of the European Union, 2020

PDF ISBN 978-92-76-19732-4 ISSN 2599-9176 doi:10.2838/086308 DS-BB-20-009-EN-N

human european consultancy

MIGRATION POLICY GROUP

Universiteit Utrecht

CONTENTS

EXECUTIVE SUMMARY

1. Introduction

The Netherlands is a representative democracy premised upon a bicameral system. King Willem-Alexander is the official head of state. The Government always consists of a coalition of different political parties, since a multitude of parties are elected to Parliament and none of them has ever had an absolute majority. The political climate in the Netherlands in the past 15 years has been influenced considerably by the rise of far right-wing parties, such as the Party for Freedom (*Partij voor de Vrijheid, PVV*). Issues brought up by such parties, in particular concerning immigration and anti-Islam or anti-terrorism measures, now dominate political discourse in general. In 2017 a new coalition Government was formed after a long period of negotiations. It consists of the People's Party for Freedom and Democracy (*Volkspartij voor Vrijheid en Democratie, VVD*) (liberal), the Christian Democrats (*Christen-Democratisch Appèl*, *CDA),* the Christian Union (*Christenunie, CU*) and the Democrats 66 (*Democraten 66, D66*).

The Netherlands is party to all the major international agreements relevant to combating discrimination, including the European Convention on Human Rights (including Protocol No. 12), the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the Covenant, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), including the Optional Protocol to this Convention, the Convention on the Rights of the Child (UNCRC) and the Convention on the Rights of Persons with Disabilities (CRPD). The latter was ratified in 2016 and upon ratification the scope of the Disability Discrimination Act (DDA) was extended. The above-mentioned instruments constitute part of the domestic legal order after they have been published in the official Law Gazette and can be applied directly by domestic courts if the provision concerned is sufficiently clear and precise.

The Kingdom of the Netherlands has the second highest population density in the European Union, after Malta. People of immigrant origin predominantly come from Turkey, Morocco, Suriname and the Dutch Antilles (although people from the Dutch Antilles cannot really be described as 'immigrants', they are nevertheless often perceived or treated as such). The main religions are Roman Catholic 24 %, Protestant 15 %, Muslim 5 %, other 6 % and none 51 % (2017).[1]

2. Main legislation

International law: the Constitution bars the Dutch Supreme Court from exercising Constitutional review of formal statutory acts. However, the Netherlands adheres to a 'monist theory' of international law. This means that the Dutch courts can apply international standards of equal treatment and non-discrimination directly, including when it concerns statutory acts.

*The Constitution***:** a non-discrimination clause is contained in Article 1 of the Dutch Constitution. It covers the grounds of religion, philosophy of life, political convictions, race and sex, as well as 'any other ground'.[2] This article can be invoked by an individual applicant against actions by the Government and by private institutions and can also be invoked between individuals.

---

1 Netherlands Statistics (2018), *Wie is religieus en wie niet?* (Who is religious and who is not?), see www.cbs.nl/nl-nl/achtergrond/2018/43/wie-is-religieus-en-wie-niet.

2 'Any other ground' includes age, disability and sexual orientation. These grounds are expressly protected in the statutory equal treatment acts which have been adopted to implement the constitutional non-discrimination clause.

Criminal law provisions: there are several provisions in the Criminal Code prohibiting discriminatory speech and prohibiting discrimination in the social and economic sphere.

General civil law: provisions in the Civil Code may offer protection against unlawful discrimination, e.g. on the basis of the provisions concerning tort and provisions concerning labour law.

Employment: the Act on Working Conditions contains an obligation to prevent any labour conditions which may cause stress or psychological or physical damage. This provision also puts a positive obligation on employers to prevent and combat discrimination and (sexual) harassment.

Statutory equal treatment acts: the relevant (civil law) equal treatment acts are the 1994 General Equal Treatment Act (GETA); the 2003 Disability Discrimination Act (DDA); and the 2004 Age Discrimination Act (ADA). The GETA covers religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation and marital status. The DDA covers disability and chronic disease, while the ADA provides protection against age discrimination. These acts elaborate Article 1 of the Constitution, in particular for horizontal relations. In addition, they must be perceived as measures transposing the equality guarantees contained in the EU anti-discrimination directives.

In the light of the implementation of Directives 2000/43/EC and 2000/78/EC the Dutch legislator has gone beyond what is strictly required by the directives. For example, the protection against discrimination on the grounds of religion and belief, sexual orientation and disability also applies in the area of goods and services.

Given the scope of this summary, the discussion is limited to the GETA, DDA and ADA in the light of the implementation of Directives 2000/43/EC and 2000/78/EC.

3. Main principles and definitions

The Dutch equal treatment laws (GETA, DDA and ADA) cover the grounds mentioned in Article 19 TFEU and some other grounds, including nationality and marital status. Specifically, the GETA covers race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status. In contrast to any other area of Dutch anti-discrimination law and in contrast to EU law, these acts are centred on the concept of 'distinction' (*onderscheid*) instead of 'discrimination' (*discriminatie*). Distinction does not have the same negative connotation, and there may be a suggestion that it is possible to justify such distinctions. In practice, however, the laws are interpreted in line with the directives and the case law of the CJEU.

Direct discrimination – Since 2011, the definition of direct discrimination in the equal treatment laws has copied the wording of the directives, except for the use of the word 'distinction' instead of 'discrimination'. Although this is not explicitly included in the definition of direct discrimination in the directives or the (amended) Dutch equal treatment laws, the possibility of discrimination by association has been acknowledged by the Dutch equality body, the Netherlands Institute for Human Rights (NIHR) and its predecessor, the Equal Treatment Commission (ETC).[3]

Indirect discrimination – Since 2011, indirect discrimination has been defined in the GETA, ADA and DDA in a similar way to the definition in the directives, except for the use of the word 'distinction' instead of 'discrimination'.

Victimisation – Legal measures of protection against victimisation are available. All three acts (GETA, DDA and ADA) provide protection against dismissal related to victimisation

[3] E.g. in ETC 2006-227 and ETC 2011-90.

and against other forms of disadvantage as a result of the fact that an individual has invoked the statutory equality act or has otherwise assisted in proceedings under these acts.

Harassment – Harassment is explicitly defined as a form of discrimination which can never be justified. The current definition of 'harassment' in the GETA, DDA and ADA mirrors the definition given in the directives. However, the current definition is stricter than the one used by the (predecessor of) the NIHR in its pre-implementation case law. Hence, the Dutch approach could fall short of the directives' *non-regression clause*.

Instruction to discriminate – Prior to implementation, the prohibition of the 'instruction to make a distinction' was already implied within Dutch equal treatment legislation. In the implementation process, this implication was made explicit within the GETA, DDA and ADA. Both the person who *instructs* (e.g. the employer) and the person who carries out the instruction (e.g. a recruitment agency) act in contravention of the law. If the instruction has been given within a hierarchical employment relationship (a manager instructing an employee to discriminate), it is only the person in charge (the manager, not the employee) whom an individual victim can hold (vicariously) liable. The Dutch approach in this respect arguably reflects an unduly narrow interpretation of the concept as contained in the directives.

Reasonable accommodation – This concept has only been enshrined in the DDA. The law speaks of 'effective' instead of 'reasonable' accommodation: the accommodation sought must have the pursued effect(s), which means that the accommodation must be both 'appropriate' and 'necessary'. It must also be reasonable, in the sense that it may not impose a disproportionate (financial) burden upon the employer. The duty to make an 'effective accommodation' is not a generic obligation: it must be clear for the employer, for example, that an accommodation is needed and what kind of accommodation that should be. Lastly, the duty can never have the effect that employers must hire people who cannot fulfil the essential job requirements.

As of 1 January 2017 a more general duty exists under the DDA to improve accessibility for people with disabilities in addition to the duty to provide reasonable accommodation in individual cases. This proactive, general duty entails the duty to ensure accessibility at least gradually (*'geleidelijk'*) for people with disabilities, unless this creates a disproportionate burden.

Exceptions – The GETA, DDA and ADA all enshrine exceptions to the central norm. In the first two acts these exceptions are explicitly and exhaustively listed by the legislator within the acts themselves as far as direct discrimination is concerned. These exceptions are interpreted restrictively by the courts and the NIHR. The ADA offers more flexibility for (semi-)judicial interpretation: both direct and indirect age discrimination may be 'objectively justified' and only certain exceptions have been *a priori* and explicitly listed within the act itself. Overall, the exceptions in the equal treatment laws, such as the general occupational requirement and the exception for ethos-based organisations, are in line with those possible under the directives.

4. Material scope

The GETA applies to the areas of employment and occupation, provision of goods and services (including education) and, only in the context of racial discrimination, the areas of social security, social protection and healthcare. All guarantees flowing from the directives also apply in the area of the provision of goods and services. The DDA applies to employment, professional education and goods and services. Some specific restrictions apply to the fields of housing and public transport. The ADA is most limited in its material scope: it only applies to employment and employment-related education.

The concept of 'employment' in all three acts must be interpreted broadly, covering both public and private sector employment and ranging from recruitment to dismissal, including promotion, employment conditions, employment mediation and (vocational) training. In addition, self-employment is covered by all three acts.

The boundaries of the GETA's scope are threefold. First, the act is not applicable with regard to the internal affairs of churches and religious communities; secondly, it remains without prejudice to already existing sex discrimination law; and thirdly it is not applicable to the internal affairs of associations (this follows implicitly from the constitutionally guaranteed freedom of association). Furthermore, the law is not applicable to unilateral acts by public officials or Government bodies (i.e. acts of regulation and legislation and acts by which such rules are executed).[4] The latter limitation to the scope does not apply to statutory social security provisions (which are only covered for the ground of race / ethnicity).

The prohibition of age discrimination in the ADA is inapplicable with regard to (occupational) pension provision (supplementary to pension provision on the basis of social security law) and with regard to actuarial calculations for pension provision.[5]

5. Enforcing the law

Neither the GETA, nor the DDA or ADA contain compulsory judicial procedures. Normal civil or administrative procedures can be used to enforce the equal treatment standards. All of these procedures lead to a legally binding decision. In practice, the equality norm is in most cases enforced through a special low threshold procedure before the NIHR. The NIHR is an independent quasi-judicial body whose case law is *non-binding* but nevertheless authoritative. No legal representation in cases before the NIHR is required. Interest groups (NGOs and other organisations) have legal standing both under the ordinary civil and administrative law procedures and the NIHR procedure. The local Anti-Discrimination Bureaux or Facilities (ADVs) often assist victims in bringing discrimination cases to the NIHR.[6] In addition, the NIHR may conduct an investigation on its own initiative. All parties involved in any investigation by the NIHR are under a duty to provide the NIHR with all requested information. A failure to do so may result in criminal law proceedings.

The 'partially reversed burden of proof' applies in procedures before the courts and is applied by the NIHR as well. With regard to sanctions, the GETA, DDA and ADA only stipulate that discriminatory dismissals (and dismissals related to victimisation) shall be voidable and that contractual provisions which are in contravention of the equal treatment acts shall be null and void. Under the ordinary court procedures, if an employee has been dismissed contrary to equal treatment law, the termination of the contract can be invalidated and the employee can thereupon claim wages. They can also request to be reinstated in the job. Alternatively, they can claim compensation for pecuniary damages under the sanctions of general administrative, contract or tort law.

The laws' complicated and, in fact, limited arsenal of sanctions raises doubts about whether the requirement in the directives, that sanctions be 'effective', 'proportionate' and 'dissuasive', is met. In addition, the statutory non-discrimination acts contain (softer) 'sanctions' which can only be imposed by the NIHR and not by the courts. Thus, the NIHR can make *recommendations* to the party who has discriminated against someone. It may also forward its findings in an Opinion to the Minister concerned and to organisations of

[4] As the directives do not require this, this is not an issue from an EU perspective.

[5] No adjustments have been made to this exception in response to the Court's judgment in *HK Danmark* (CJEU 26 September 2013, C-476/11), in which age-related increases in pension contributions were found to be outside the scope of Article 6(2) of the Employment Equality Framework Directive.

[6] The current legislation uses the term 'facility'. In this report the terms 'bureaux' and 'facilities' are used interchangeably as the term 'bureaux' was used formerly and is still used by many organisations.

employers, employees, professionals and the like. Situation testing and the use of statistical evidence to prove indirect discrimination are admissible in court.

Furthermore, although this option has never been used, the NIHR may bring legal action with a view to obtaining a court ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.

6. Equality bodies

The NIHR is the main officially designated equality body (on the basis of Article 13 of the Directive 2000/43/EC). It has a broad human rights mandate within which it also operates as a quasi-judicial tribunal type of equality body and gives legal opinions on discrimination complaints. These opinions are not binding, but are in practice very authoritative. Its mandate further covers conducting surveys and issuing reports and recommendations. The NIHR does not cover the task of assisting victims of discrimination. This function is carried out by the ADVs (see below), as it is considered in the Netherlands to be contradictory to the main task of the equality body, which is to hear and investigate cases of (alleged) discriminatory practices or conduct. This latter task takes up a substantial portion of the time and resources of the NIHR. The NIHR also operates in a consultative fashion (e.g. for the Government when drafting or amending equality laws or for employers when developing new policies) and it performs information and research activities (e.g. through its annual bulletins and by assigning research projects to independent institutes).

In short, the NIHR (in contrast to the courts) operates both reactively and proactively in order to give full effect to the principles of equality and non-discrimination. The NIHR members are mostly legal experts and are independent of the Government. The (expert) members are appointed by the Government for a fixed period of six years. Members of staff have the same position as civil servants working for a ministry but are only accountable to the Director of the NIHR (not to a minister). The NIHR is funded by the Government (from the budgets of a number of ministries). It is accountable to the Government by means of an annual report and by independent financial auditing. Every five years an internal and external evaluation report is published (and submitted to the Government and Parliament). The NIHR has ten members and a Director and a staff of approximately 50-60 (mostly academic lawyers). The NIHR deals with all non-discrimination grounds in the GETA, DDA and ADA, as well as more specific equal treatment grounds (such as the type or duration of employment contracts). It is also responsible for monitoring the implementation of the CRPD. All reports, advice and Opinions (judgments in individual cases) are published on the Institute's website.[7]

The local Anti-Discrimination Facilities (ADVs) have also been designated by the Government as equality bodies in terms of the directives. All local authorities are obliged by law to have an ADV in place. The ADVs were designated as equality bodies in the Explanatory Memorandum to the Act on Local Anti-Discrimination Facilities.[8] The ADVs have two legal tasks: to assist people who have a discrimination complaint and to register all such complaints and bring them to the attention of the Minister of the Interior and Kingdom Relations. In addition to this, one of the functions that these organisations fulfil is situation testing, mostly with respect to bars and nightclubs.

The NIHR and ADVs thus fulfil different tasks, closely related but not overlapping. The NIHR and the ADVs all function independently.

---

7 www.mensenrechten.nl/.

8 See Tweede Kamer, 2007-2008, 31 439, no. 3, p. 7.

7. Key issues

The following key issues are most significant and/or problematic in the Dutch context, regarding the implementation and transposition of the directives:

- The main, general issue of concern regards the increasing tensions in Dutch society between various minority and majority groups which seem to increase exclusion and discrimination, in particular in relation to race/ethnic origin and migration background. Research shows that discrimination against people with a migration background is prevalent in many areas such as the labour market, housing and vocational training (internships).[9] Racist speech is also a recurring problem, be it on the internet or in public spaces. The conviction of politician Geert Wilders for insulting Moroccans is a case in point. The District Court of The Hague accepted the claim that, under the circumstances, this constituted incitement to discrimination against a group of people on grounds of their race.[10] The appeal against the verdict is still pending. Another salient and continuing issue in this context has been the debate on the allegedly racist character of Black Pete (*Zwarte Piet*), one of the central figures in the Dutch Saint Nicholas festivities.

- In terms of the implementation and practical application of the anti-discrimination directives at national level, a major problem concerns the gap between the law in the books and realities on the ground. Overall, Dutch legislation to combat discrimination is up to European standards, but the prevalence of discrimination is still of grave concern.

Nevertheless, some issues regarding implementation do not seem to comply fully with the standards:

- The accumulative conditions in the 'harassment' definition arguably fall short of the directives' 'non-regression' clause (see Section 2.4 of the report).
- Arguably, the Dutch Government interprets the prohibition of an 'instruction to make a distinction' unduly narrowly, including in relation to the 'scope of liability' for this type of discrimination (see Section 2.5 of the report).
- Both Article 2(5) and Article 7(2) of the Employment Framework Directive talk about national legislation or measures taken by the Member States' governments in order to protect health and safety. Article 3(1)(a) of the DDA provides for a justification on this ground, but it is disputable whether this provision is in line with the requirements of the Directive (see Section 4.6 of the report).
- The partially reversed burden of proof is not applicable in case of victimisation claims, which falls short of EU requirements (see Section 6.4 of the report).
- The requirement that sanctions need to be 'effective', 'dissuasive' and 'proportionate' seems not to be met by the Dutch legislation (see Section 6.5 of the report).
- Apart from this, at some points the equal treatment law has been worded in such a way that a rather wide interpretation of the provision is possible, leaving, for example, more room for justifications than would seem appropriate, considering the

---

[9] See e.g. SCP (2014), *Ervaren Discriminatie in Nederland* (Experience of discrimination in the Netherlands), available at: https://www.scp.nl/binaries/scp/documenten/publicaties/2020/04/02/ervaren-discriminatie-in-nederland-ii/Ervaren+discriminatie+in+Nederland+II.pdf; SCP (2015), *Op Afkomst Afgewezen* (Rejected due to origin): https://www.scp.nl/publicaties/publicaties/2015/06/17/op-afkomst-afgewezen; *Groene Amsterdammer* (2018) 'Onderzoek discriminatie woningmarkt. Rachid is ook gewoon een nette jongen' ('Investigation of discrimination in the housing market. Rachid is just an ordinary, decent man'), 28 March 2018: https://www.groene.nl/artikel/rachid-is-ook-gewoon-een-nette-jongen. Kennisplatform Integratie en Samenleving (2016) *Mbo en de stagemarkt: wat is de rol van discriminatie?* (MBO and the market for internships: what role for discrimination?): www.kis.nl/publicatie/mbo-en-de-stagemarkt-wat-de-rol-van-discriminatie.

[10] District Court of The Hague, 9 December 2016 (case Wilders) ECLI:NL:RBDHA:2016:15014 (in Dutch only) https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014 Summary in English: www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Nieuws/Paginas/Wilders-found-guilty-of-insultment-of-a-group-and-incitement-to-discrimination.aspx.

general rule of the CJEU that exceptions to the non-discrimination principle should be interpreted restrictively. However, the Dutch NIHR and the courts do seem to follow the CJEU in this regard, so in practice this is not really problematic.[11]

Positive developments and good practice that stand out in 2019 are the following:

- The functioning of the NIHR. The first evaluation report on the functioning of the NIHR, for the period 2012-2017, is positive overall and concludes that:
  - the integration of the former Equal Treatment Commission into the NIHR did not have detrimental effects; the NIHR has found a good balance between its equality mandate and its broader human rights mandate;
  - its semi-judicial role regarding discrimination complaints is perceived as being high-quality and authoritative (see Section 7 a) and 7 c) below).[12]

- Concerted efforts by several actors (the NIHR, the Ombudsman, public interest litigation organisations and the EU Commission) resulted in a policy change regarding Roma housing. The new housing policy framework for Roma, Sinti and Travellers is directed at preventing discrimination against Roma, ensuring their cultural rights and providing legal security in the area of housing. Most importantly, municipalities are no longer allowed to pursue an 'extinction policy' regarding trailer sites (see Section 3.2.10 under a)).[13]

- Further integration of anti-discrimination programmes developed by various ministries, including annual monitoring, was achieved to enhance their effectiveness (see Section 9).[14]

- The Minister of Social Affairs and Employment has announced new legislation to combat discrimination in recruitment and selection processes. Employers and intermediary agencies will be obliged to adopt policies to counter discrimination, subject to enforcement by the labour inspection agency (see Section 3.2.2). The proposal has not yet been submitted to Parliament.

---

11 For example, Supreme Court 19 April 2019, ECLI:NL:HR:2019:647.

12 *Evaluatie Wet College voor de rechten van de mens* (Evaluation of the National Institute of Human Rights Act), *Tweede Kamer* 2017-2018, 34 338 no. 3, pp. 2-3.

13 Minister of the Interior and Kingdom Relations, *Beleidskader Gemeentelijk woonwagen- en standplaatsenbeleid* (Policy framework for municipal trailer and campsite policy): www.rijksoverheid.nl/documenten/rapporten/2018/07/02/beleidskader-gemeentelijk-woonwagen-en-standplaatsenbeleid.

14 *Kamerbrief inzake kabinetsaanpak en voortgangsrapportage over het Nationaal actieprogramma tegen discriminatie* (Letter to Parliament regarding the Cabinet's approach to and progress report on the National Action Programme against Discrimination), April 2018: www.rijksoverheid.nl/documenten/kamerstukken/2018/04/26/kamerbrief-inzake-kabinetsaanpak-en-voortgangsrapportage-over-het-nationaal-actieprogramma-tegen-discriminatie.

INTRODUCTION

The national legal system

In the Netherlands, central Government is the only level of government that passes anti-discrimination or equal treatment legislation. The principles of equality and non-discrimination are covered by various areas of the law. Of importance are the Constitution, public and private employment law, criminal law and specific statutory equal treatment acts. Moreover, since the Dutch constitutional system adheres to a 'monist theory' of international law, international equality guarantees are automatically applicable in the national legal system and take precedence over national legislation, provided that they are sufficiently clear and precise to be justiciable in concrete cases (cf. Articles 93 and 94 of the Constitution). Private employment contracts are regulated by Book 7 of the Civil Code (*Burgerlijk Wetboek*), which contains equal treatment provisions, and by specific statutory equal treatment acts. Furthermore, regulation may occur through Collective Labour Agreements at the level of the sector or individual employer. For civil servants, a law was adopted to make their employment subject to the same rules as private sector employment, with the exception of certain specific categories including judges and military personnel.[15] The main equality body is the Netherlands Institute for Human Rights (NIHR) (*College voor de Rechten van de Mens*), which has a section that deals with complaints about unequal treatment.

List of main legislation transposing and implementing the directives

- Article 1 of the Constitution (*Grondwet*) enshrines a constitutional equality and non-discrimination guarantee.
- International non-discrimination provisions (e.g. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 14 of the European Convention on Human Rights (ECHR)) can be directly applied in court proceedings. Sometimes provisions from the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the UN Convention on the Rights of People with Disabilities (CRPD) or the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are also called upon before Dutch courts. The Netherlands ratified the CRPD on 14 June 2016.
- EU Treaty provisions and directives can be directly applied under the normal conditions for applicability of EU Law in the Member States.
- The Criminal Code (*Wetboek van Strafrecht*) includes specific provisions criminalising discriminatory speech and publications (Articles 137d-137f) and discriminatory acts in the performance of an individual's job or enterprise (Articles 137g and 429quater). Discrimination is defined in Article 90quater, in line with Article 1 of the UN ICERD and therefore different from the definition in the directives. In addition, Article 137c forbids insulting groups of people because of their race, religion/belief or homo-/heterosexual orientation.[16]
- The Civil Code (*Burgerlijk Wetboek*) includes specific articles prohibiting sex discrimination and discrimination in relation to the duration of employment contracts and whether they are permanent or fixed-term contracts (Articles 7:646-7:649). Employers are also liable if they fail to guarantee safe working conditions. This includes an environment free from discrimination and (sexual) harassment (Article 7:658).

---

[15] Act on the regularisation of the legal status of civil servants (*Wet normalisering rechtspositie ambtenaren*), *Staatsblad* 2017, 123. The Act will enter into force on 1 January 2020. The exempted categories are listed in Article 3 Civil Servants Act (*Ambtenarenwet 2017*).

[16] The term 'homosexual or heterosexual orientation' was used instead of the more ordinary term 'sexual orientation' to make clear that it does not include paedophile orientation. To avoid confusion in this report 'sexual orientation' is used throughout unless otherwise indicated, as this is what the Dutch law intends to cover.

- The Civil Servants Act (*Ambtenarenwet*) contains similar provisions for the public service sector (Articles 125g en 125h). Both provisions were abolished as of 1 January 2020 due to the regularisation of the employment of civil servants (see above).
- The Act on Working Conditions (*Arbeidsomstandighedenwet*) contains provisions concerning (sexual) harassment, aggression, violence and discrimination in the workplace. These provisions put a positive obligation on employers to prevent and combat discrimination and (sexual) harassment. The Labour Inspectorate (*Arbeidsinspectie*) can impose fines on employers who do not comply with this obligation.
- Since 1994, race and ethnic origin, religion and belief and sexual orientation have been covered together with 'political opinion', 'sex', 'nationality' and 'civil status' as grounds for discrimination by the General Equal Treatment Act or GETA (*Algemene Wet Gelijke Behandeling*).[17] After the adoption of the directives, the GETA was amended by the EC Implementation Act.[18] This Act entered into force on 1 April 2004.[19] Importantly, the Dutch Government deemed it desirable to extend many of the amendments that were legally required for the grounds covered both by the 1994 Act and the directives (e.g. 'race', 'religion/belief', 'sexual orientation') to other grounds that are also covered by the GETA.[20] In 2019 a provision was added to the GETA specifying that the ground 'sex' covers sex characteristics, gender identity and gender expression.[21]
- The Act on Equal Treatment on the Ground of Age in Employment (*Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid*), hereafter referred to as the Age Discrimination Act (ADA),[22] entered into force on 1 May 2004.[23]
- The Act on Equal Treatment on the Ground of Disability or Chronic Illness (*Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte*) hereafter referred to as the Disability Discrimination Act (DDA).[24] entered into force on 1 December 2003.[25] In 2004 the DDA was amended by means of the aforementioned EC Implementation Act. The initial scope of the DDA was restricted to employment and vocational education, but in 2009 this was extended to the fields of primary and secondary

---

17 Act of 2 March 1994, concerning the establishment of general rules protecting against discrimination on the ground of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation, or civic status (*Wet van 2 maart 1994 houdende algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, nationaliteit, hetero- of homoseksuele gerichtheid of burgerlijke staat*), *Staatsblad* (Official gazette)*1994,* 230.

18 Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act and some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (*Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG (EG Implementatiewet AWGB*), *Staatsblad 2004*, 119.

19 Determined by Governmental Decree of 11 March 2004, concerning the establishment of the date for the entry into force of the Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act and some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (EC Implementation Act GETA) (*Besluit van 11 maart 2004, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG (EG Implementatiewet AWGB)*), *Staatsblad 2004*, 120.

20 Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 3.

21 Act on the clarification of the legal status of transgender and intersex persons (*Wet verduidelijking rechtspositie transgender personen en intersekse personen*), *Staatsblad* 2019, 302.

22 Act of 17 December 2003, concerning the equal treatment on the ground of age in employment, occupation and vocational training (*Wet van 17 december 2003, houdende gelijke behandeling op grond van leeftijd bij de arbeid, beroep en beroepsonderwijs*), *Staatsblad 2004*, 30.

23 Determined by Governmental Decree of 23 February 2004, concerning the establishment of a date for the entry into force of the Act on Equal Treatment on the Ground of Age in Employment (*Besluit van 23 februari 2004, houdende vaststelling van de datum van inwerkingtreding van de Wet gelijke behandeling op grond van leeftijd bij de arbeid*), *Staatsblad 2004*, 90.

24 Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease (*Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van handicap of chronische ziekte*), *Staatsblad 2003*, 206.

25 Determined by Governmental Decree of 11 August 2003, concerning the establishment of a date for the entry into force of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease (*Besluit van 11 augustus 2003, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet gelijke behandeling op grond van handicap of chronische ziekte*), *Staatsblad 2003*, 329.

education (Article 5b DDA) and housing (Articles 6a, 6b and 6c DDA).[26] Public transport is covered in Articles 7 and 8 of the law and these Articles entered into force on 9 May 2012. However, the Decree giving effect to these Articles contains a complicated schedule of gradual implementation.[27] In fact, it will take until 2030 before the whole public transport sector (apart from transport on ferries) will actually fall under the scope of the DDA. In 2009, an evaluation report, written by independent experts, was sent to Parliament.[28] Upon ratification of the CRPD the scope of the DDA was further extended and now covers the field of goods and services in general. However, some specific restrictions still apply to public transport and housing.

- The Act on the establishment of the National Institute of Human Rights (*Wet College rechten voor de mens*) hereafter referred to as the NIHR Act entered into force on 1 October 2012.[29] The tasks and functions of the former Equal Treatment Commission were taken over by the NIHR.

[26] Amendment to the Disability Discrimination Act concerning the extension to primary and secondary education and housing (*Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen*), *Staatsblad 2009*, 101.

[27] See the Decree of 19 April 2012, Staatsblad 2012, 199. The Decree is entitled 'Concerning the establishment of a date for the entry into force of Articles 7 and 8 of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease and the entry into force of the Decree on the accessibility of public transport' (*Houdende het tijdstip van inwerkingtreding van de artikelen 7 en 8 van de Wet gelijke behandeling op grond van handicap of chronische ziekte en inwerkingtreding van het Besluit toegankelijkheid van het openbaar vervoer*).

[28] See Tweede Kamer, 2008-2009, 29 355, no. 39. The then ETC published its own evaluation report, entitled *Zonder vallen en opstaan; Evaluatie van de WGBHcz* (Without trial and error: evaluation of the DDA), available at: www.mensenrechten.nl/publicaties/detail/10027.

[29] Act of 24 November 2011 containing the establishment of the Netherlands Institute for Human Rights (*Wet van 24 november 2011, houdende de oprichting van het College voor de rechten van de mens*), *Staatsblad 2011*, 573.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

In the Dutch constitution, Article 1 covers non-discrimination:

> 'All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex or on any other ground shall be prohibited.'

This provision applies to all areas covered by the directives. Its material scope is wider than those of the directives, as there are no boundaries to the personal and material scope of this article, which means that the Constitutional provision applies to everybody in the country and to all fields of social and economic life. The term 'any other ground' is understood to include age, disability and sexual orientation: these grounds are expressly protected in the statutory equal treatment legislation which implements the constitutional non-discrimination clause. A proposal is pending in Parliament to explicitly mention the grounds 'homosexual or heterosexual orientation' and 'disability' in Article 1 of the Constitution.[30] [31]

The constitutional anti-discrimination provision is directly applicable in vertical relations. There is a limitation to this: formal statutory Acts (adopted by the Government in co-operation with Parliament) may not, according to Article 120 of the Constitution, be subjected to Constitutional review by the courts and thus also not to a Constitutional 'equality' review.[32] However, Dutch courts do have the power to revoke legislation that violates any directly applicable provision of international law (under Articles 93 and 94 of the Constitution). With respect to discrimination, the Dutch courts frequently have to consider whether a particular piece of legislation violates Article 14 of the European Convention on Human Rights, Article 26 of the International Covenant on Civil and Political Rights, or any other international or European non-discrimination provision.

The constitutional equality clause can be enforced against private actors.[33] However, since this is an 'open clause' it does not specify what the equal treatment or non-discrimination norm entails in concrete situations and how this norm should be weighed against other constitutional rights (e.g. freedom of speech/opinion or freedom of belief/religion). In order to ensure the applicability of the equality principle in horizontal relations, the Constitutional guarantee has been incorporated into criminal law provisions and specific statutory equal treatment legislation (ADA, DDA, GETA and ETA).

[30] Tweede Kamer 2009/2010, 32 411, nr. 2. The proposal was retabled in 2019 after a period of inactivity. Amendments to the Constitution are subject to an enhanced legislative procedure, including two readings and the requirement for a two-thirds majority.

[31] According to the explanatory memorandum, the proposal uses the term 'homosexual or heterosexual orientation' instead of 'sexual orientation' to comply with the terminology of the GETA and avoid problems of interpretation (Tweede Kamer 2009/2010, 32 411, nr. 3, p. 15).

[32] Over time several bills have been proposed to introduce Constitutional review into the Constitution, but so far none have been adopted.

[33] E.g. Supreme Court 8 October 2004, *NJ* 2005/117 (*Van Pelt/Martinair* and *KLM / Vereniging van Verkeersvliegers*), ECLI:NL:HR:2004:AP0425.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation transposing the two EU anti-discrimination directives:

sex (including pregnancy, sex characteristics, gender identity and gender expression), religion or belief,[34] political opinion, race, nationality, sexual orientation,[35] civil (marital) status, age and disability or chronic disease.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

The words racial or ethnic origin, religion or belief, disability, age and sexual orientation are not defined in Dutch equal treatment law. Dutch equal treatment legislation applies symmetrically, in the sense that people from both the dominant group and the disadvantaged group are covered. However, as grounds of discrimination have to be interpreted in concrete cases, some indications about the definition of grounds can be derived from case law.

a) Racial or ethnic origin

The Explanatory Memorandum to the GETA[36] stresses that 'race' is a broad concept, which must be interpreted in line with the UN International Convention on the Elimination of Racial Discrimination (ICERD).[37] The concept embraces race, colour, descent and national or ethnic origin.[38] The Supreme Court, as well as the NIHR, uses the ICERD definition of race. In the EC Implementation Act of 2004, the Government has not deemed it necessary to explicitly include the notion of 'ethnic origin', since this is sufficiently captured by this interpretation of 'race'.[39] The NIHR uses as a yardstick whether the applicant belongs to 'a coherent group with collective physical, ethnic, geographical or cultural characteristics and which distinguishes itself from other groups by common features or a common behaviour'.[40] Sometimes, however, it is difficult to draw the line between race, ethnicity and religion.[41] If all three grounds were protected in the same sense (as far as the personal and material scope of the legislation is concerned and the exceptions to the non-discrimination ground are similar for each of these grounds), that would be no problem. However, this is not the case in the Dutch legal system (where race is covered more broadly than religion). Another discussion concerns the exact borderline between 'race / ethnicity'

---

[34] The Dutch terms are '*godsdienst en levensovertuiging*', which would translate more closely as 'religion and philosophical conviction' rather than 'religion or belief'. As it definitely encompasses 'religion and belief' as envisaged in EU law the latter terminology is used in this report to avoid confusion.

[35] The Dutch terms used are 'homo- or heterosexual orientation' instead of sexual orientation for short. This terminology was adopted at the time when the GETA came into being in 1994 to make it clear that paedosexual orientation is not regarded as a protected ground. As it covers the same grounds as the terminology 'sexual orientation' under EU law this report uses the latter to avoid confusion.

[36] Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3 (*Memorie van Toelichting bij de Algemene Wet Gelijke Behandeling*).

[37] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 21 December 1965.

[38] Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3, p. 13. It should be noted that the notion of 'national origin' only embraces nationality in an *ethnic* sense. Nationality in a *civic* sense is covered by the non-discrimination ground of nationality.

[39] Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 3. See also Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* (*Equal treatment legislation*), Deventer, Kluwer, pp. 28-30.

[40] See, for example, ETC 1997-119 and 1998-57.

[41] In line with the interpretation by e.g. the European Court of Human Rights discrimination against Jews is put on a par with discrimination on grounds of race. Discrimination against Muslims is not approached in a similar way.

and nationality (which is also covered under the GETA).[42] In cases concerning hate speech and insults against a group (see Introduction) the Supreme Court accepted that the ground 'race' covers references to nationality and immigration status (e.g. 'Surinamese', 'Moroccans' and 'asylum seekers').[43] In line with this case law, politician Geert Wilders was found guilty in 2016 of incitement to racial discrimination against 'Moroccans'.[44] The appeal against the verdict is still pending.

In general, both Dutch courts and the NIHR tend to interpret the definition of 'race' as referring to particular characteristics (e.g. colour, national origin or culture) rather than as a category resulting from processes of racialisation.[45]

b) Religion or belief

Religion is also not defined in the Constitution, in the GETA or anywhere else in the equal treatment legislation. In the Netherlands the term 'belief' is not used. In the Explanatory Memorandum to the EC Implementation Act, the Government has made it clear that it wishes to continue using the term 'philosophy of life' (*levensovertuiging*), rather than to introduce the term belief (*geloof*), the term used by Directive 2000/78/EC. According to the Government, there is no material difference between these two terms.[46] 'Religion or belief' is interpreted in a broad sense. In cases that come before the NIHR and the courts (including cases concerning the freedom of religion), the Institute and the judges use a wide definition of religion and belief. The only restriction to the scope of the concept is that it should exceed a mere personal conviction or expression.[47] On the other hand, it is not necessary that all believers of a certain religion adhere to a certain conviction (e.g. the wearing of headscarves by women).[48] Finally, it is also established in case law that the right not to be discriminated against on the ground of religion incorporates both the right to have religious beliefs or to adhere to a certain philosophy of life and the right to act in accordance with that religion or belief.[49] Since political opinion is also protected, no sharp line between belief and political opinion needs to be drawn. The interpretation of all of these terms is strongly inspired by the case law of the European Court of Human Rights (ECtHR) and other international institutions (e.g. the UN Human Rights Committee).

c) Disability

Dutch equality law does not define disability, as the Government has deemed it unnecessary and undesirable to do so.[50] However, unlike the Employment Equality Directive, the DDA expressly mentions 'chronic disease' as a ground alongside 'disability'. With regard to the definition, some guidelines can be derived from the *travaux préparatoires* of the DDA and the cases of the then ETC (now the NIHR). Criteria mentioned during the preparation of the Law were, amongst others, the long duration of the disability

---

42 See, for example, ETC 2011-97 and 2011-98, especially the note to both cases by A. Böcker and S. Dursum-Aksel, to be found in Foster, C. J. et al. (eds.) (2012), *Oordelenbundel 2011* ('NIHR Opinions 2011'). Nijmegen, Wolf Legal Publishers, pp. 453-464.

43 E.g. Supreme Court 16 April 1996, ECLI:NL:PHR:1996:AD2525; Supreme Court 26 June 2012, ECLI:NL:HR:2012:BW9189.

44 District Court of The Hague 9 December 2016 (Wilders case) ECLI:NL:RBDHA:2016:15014 (in Dutch) https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014. Summary in English: www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Nieuws/Paginas/Wilders-found-guilty-of-insultment-of-a-group-and-incitement-to-discrimination.aspx.

45 E.g. Supreme Court 20 March 2016, ECLI:NL:HR:2016:510; NIHR 23 December 2019, 2019-135.

46 Since the government does not seem to see a difference in meaning, we have translated *levensovertuiging* as 'belief' in this report. The NIHR, in the English translation of the GETA on its website, also translates '*levensovertuiging*' as 'belief'.

47 See, for example, ETC 2007-207.

48 See, for example, ETC 2008-12.

49 See, for example, ETC 1997-46, 2004-112 and 2004-148, as well as the Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3, p. 39-40. And, similarly, Memorandum in Response to the GETA, 1990-1991, 22 014, no. 5, p. 39-40 (*Memorie van Antwoord bij de Algemene Wet Gelijke Behandeling*).

50 Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 9.

or chronic disease and the fact that – in the case of disability – the impairment is irreversible. This means that a short-term disability is excluded.[51] According to the Explanatory Memorandum to the DDA, the concept of disability (*handicap*) may cover not only physical, but also intellectual and psychological impairments.[52] The Government is of the opinion that the question of what constitutes a disability is not only dependent on the physical or psychological characteristics of the individual, but also on the physical and social environment that allows/does not allow a person to participate on an equal footing. The NIHR has accepted this line of reasoning and – considering the goal of the DDA – interprets the terms disability and chronic disease in an extensive way.[53]

d) Age

The legislator has not defined the word 'age'. However, it is not only direct references to someone's age that are considered to be direct distinctions on this ground. The use of classifications like 'young', 'old', 'adult', 'pensioner' or 'student' may also be considered to cause age discrimination. Since the ADA allows for objective justifications (open system) in case of both direct and indirect discrimination, the boundary between what kind of classification constitutes direct or indirect discrimination is not problematic.

e) Sexual orientation

The GETA employs the terminology 'hetero- or homosexual orientation', to cover the ground of 'sexual orientation' of Directive 2000/78/EC. It does not specify further what is covered by these terms. The Dutch Government opted for the term 'orientation' (*gerichtheid*) rather than 'preference' (*voorkeur*). The term 'orientation' reflects that it is not only individual emotions that are covered, but also concrete expressions thereof. Another major reason for the preference for the term 'hetero- or homosexual orientation' over 'sexual preference' or 'sexual orientation' is that the latter terms might possibly include 'paedophile orientation'. The notion of 'hetero- or homosexual orientation' has been interpreted by the courts to cover bisexual orientation, but it excludes transsexuals and transgender people. Instead, discrimination on the ground of being a transsexual or transgender or intersex person is regarded as a form of sex discrimination.[54] In 2019 a provision was added to the GETA specifying that distinctions based on sex include distinctions based on sex characteristics, gender identity and gender expression.[55]

2.1.2 Multiple discrimination

In the Netherlands, multiple discrimination is not prohibited by law. Although the GETA contains a closed list of non-discrimination grounds, parliamentary precedent does not exclude the possibility of a combination of grounds. Moreover, including the prohibition of discrimination based on a combination of grounds seems to be most in line with the legislator's objectives. In its third five-yearly evaluation report, the then ETC concluded that it may be desirable to include an explicit prohibition of multiple discrimination in the GETA.[56] The Government did not deem such a provision necessary and rejected a suggestion for further research.[57]

---

[51] See the Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 9 and p. 24 and no. 5, p. 16. See also ETC 2005-234.
[52] Tweede Kamer, 2001-2002, 28 169, no. 3, p. 24.
[53] See, for example, ETC 2005-234, 2006-227, 2007-25, 2009-62, 2009-102 and 2011-78.
[54] Court of Appeal Leeuwarden, 13 January 1995, *NJ* 1995, 243, ECLI:NL:GHLEE:1995:AC2855; ETC Opinions 1998-12, 2000-73, 2004-72/73, 2007-201, 2009-108, 2010-175, 2012-146 and 2012-166; NIHR Opinion 2019-116.
[55] Act on the clarification of the legal status of transgender and intersex persons (*Wet verduidelijking* rechtspositie transgender personen en intersekse personen), Staatsblad 2019, 302.
[56] ETC (2011), *Third evaluation report (2004-2009)*, p. 64.
[57] Tweede Kamer, 2011-2012, 28 481, no. 16, p. 4.

In the Netherlands, the following case law deals with multiple discrimination: the ETC (now the NIHR) followed an intersectional approach in a case where the grounds of disability and race intersected and it acknowledged the combined effect thereof.[58] However, this combined effect did not provide a reason for a different sanction in this case.[59] In its third evaluation report, the (then) ETC acknowledged that there were other cases concerning multiple grounds at the same time.[60] The ETC (now the NIHR) has shown willingness to apply different grounds of discrimination coherently in some of these other cases (with gender aspects as well), but in each case the claimant failed to substantiate the (alleged) discrimination, as well as the combined effect of the intersection of grounds.[61] One category of cases in which the NIHR could apply this approach would be that concerning Islamic headscarves. Such cases are almost always seen only as direct or indirect discrimination on the ground of religion.[62]

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In the Netherlands, discrimination based on a perception or assumption of a person's characteristics, is not prohibited in national law (GETA, ADA and DDA) in an explicit way, but such cases are covered implicitly as case law shows. Thus, for example, the NIHR considered the complaint of a man who alleged he had been refused for a job because of his non-Dutch-sounding name as a case of potential racial discrimination.[63]

b) Discrimination by association

In the Netherlands, discrimination based on association with people with particular characteristics is not prohibited in national law in an explicit way. However, the wording of Article 1 sub (b) of the GETA (the legal definition of 'direct distinction') does not explicitly require that the alleged distinction is based on the race, religion/ belief or sexual orientation of the alleged victim. It is therefore theoretically possible that discrimination based on association is covered as well. The same line of reasoning can be followed as regards age and disability, in respect of Articles 1 (b) ADA and DDA. In several opinions the ETC has indeed followed this line. In 2011, the ETC, with reference to the Court of Justice of the European Union (CJEU) in *Coleman*,[64] found that there was indeed a case of unlawful discrimination by association on the ground of disability. In that case, a temporary contract was not prolonged because the employee had called in sick several times because he had to take care of his wife, who was ill. The same approach to discrimination by association is applied where other grounds are concerned. Thus, when the owner of a house refused to rent it to a woman because her friend was dark-skinned, the NIHR regarded this as direct discrimination on grounds of race.[65]

---

58 ETC 2006-256, concerning a complaint against an employment office by a blind Turkish woman for not being entitled to an adapted examination. An example of a case in which multiple discrimination is at issue is NIHR 2013-33 concerning ethnic origin, age, disability, sex and economic status.

59 Since the ETC (now the NIHR) cannot impose sanctions, this is a somewhat misleading statement. There was the usual conclusion that the defendant had made an unlawful distinction.

60 ETC (2011), *Third evaluation report (2004-2009)*, pp. 61-62. Apart from the cases mentioned below, the ETC here also mentions Opinion 2008-25 (complaint about season tickets for football stadiums, involving sex and civil status). In Opinion 2011-83, the grounds of sex and age were at issue. Again, the ETC did not take this fact explicitly into consideration.

61 For example, ETC 2008-107 (complaint by an elderly non-Dutch woman because she had not received a subsidy to start a company; presumption not substantiated, no breach); NIHR 2017-72 (complaint by a man of Afghan origin who was rejected for a job as a receptionist at a motel; presumption not substantiated, no breach, and NIHR 2019-109 (complaint by a Muslim man of Moroccan origin about discriminatory treatment by an occupational physician following his refusal to shake her hand; presumption not substantiated, no breach).

62 For example, NIHR Opinions 2017-135, 2018-24 and 2019-57. In Opinion 2017-91 the NIHR treated the case as involving race as well as religion however the claim was deemed in substantiated.

63 NIHR 2018-87.

64 Case C-303/06, *Coleman v Attridge Law* [2008], ECR I-5603.

65 NIHR 2018-115.

2.2 Direct discrimination (Article 2(2)(a))

a) Prohibition and definition of direct discrimination

In the Netherlands, direct discrimination is defined and prohibited in national law.

Before 2011, Dutch equal treatment legislation contained its own (different) definition of direct and indirect discrimination. In November 2011 the equal treatment legislation (including the GETA, DDA and some provisions in the Civil Code) was amended in order to bring the definitions of direct and indirect discrimination into line with the EU directives.[66] This change was required by the European Commission, which maintained that, as a consequence of the different wording of the definitions, victims of discrimination were offered less protection than the EU directives require.[67] The Government has always held that this was not the case,[68] but nevertheless proposed this Amendment in 2008, in which the definitions from the directives are included word for word.[69] One difference between the language in the directives and the Dutch legislation remains, namely, the usage of the word 'distinction' instead of the word 'discrimination'.

Article 1 of the GETA now reads as follows:

> 'In this Act and in the provisions based upon this Act the following definitions shall apply:
> a. Distinction: direct and indirect distinction, as well as the instruction to make a distinction;
> b. Direct distinction: if a person is treated differently from another person in a comparable situation is or would be treated on the grounds of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation or civil status; (…).'[70]

Although the comparator element is now included in the definition, it is unclear from the definition of direct distinction in the DDA with whom a disabled person must be compared in case of an alleged instance of direct distinction. In the Parliamentary discussions on the DDA it is stated that what matters is not (actually) having a disability but being discriminated against as compared with a person who does or does not have a disability. It seems that this must be decided on a case-by-case basis. There are some Opinions of the ETC (now the NIHR) in which this issue has been discussed.[71]

b) Justification of direct discrimination

Under the GETA and DDA, direct distinctions can never be justified unless one of the exception clauses apply (see, for the latter, Sections 4 and 5 of this report).

On a few occasions, the former ETC accepted that direct discrimination may be objectively justified when the prohibition of a certain distinction would be absolutely unacceptable or completely irrational, without the presence of one of the listed grounds of justification.[72]

---

66 Act of 7 November 2011 (*Wet van 7 November 2011*), *Staatsblad 2011*, 554.

67 Letter dated 31 January 2008, with reference to the infringement procedure of 18 December 2006, infringement no. 2006/2444.

68 Letter from the Dutch Government to Vladimír Špidla, dated 18 March, entitled *Reactie Nederlandse regering op het met redenen omkleed advies van de Europese Commissie; ingebrekestelling no. 2006/2444* (response to letter dated 31 January 2008).

69 See Tweede Kamer, 2008-2009, 31 832, nos. 1-3 and Tweede Kamer, 2009-2010, 31 832, nos. 4-8.

70 The DDA and ADA contain similar definitions in Articles 1(a) and (b).

71 See ETC 2005-234. Although in that case the Commission stated that the applicant should not compare himself with other disabled people, according to many commentators the possibility exists for a disabled person to compare themselves with people who have a different disability.

72 See, for example, ETC 2006-20 and ETC 2007-85; other cases are ETC 2005-155 concerning pregnancy and ETC 2010-62 concerning goods and services.

Though the third evaluation report of the ETC (for the years 2004-2009) raised the question whether the closed system of justification should be opened up,[73] the issue was put to rest with the evaluation of the NIHR over the period 2012-2017: as it has manifested itself only very sporadically and was always resolved in a practical manner it was deemed unnecessary to amend the law by both the NIHR and the Government.[74]

2.3 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

In the Netherlands, indirect discrimination is defined and prohibited in national law. Before 2011, Dutch equal treatment laws contained a definition of direct and indirect discrimination that was different from the EU directives. In November 2011 the equal treatment laws (including the GETA, DDA, ADA and some provisions in the Civil Code) were amended in order to bring the definitions of direct and indirect discrimination into line with the directives.[75] Article 1(c) of the GETA now includes the following definition of 'indirect distinction':

> 'Indirect distinction: where an apparently neutral provision, criterion or practice would affect persons of a particular race (et cetera) in a particular way.'[76]

b) Justification test for indirect discrimination

Article 2(1) of the GETA contains an objective justification test for indirect distinction cases, which includes the elements of legitimate aim, appropriateness and necessity. The same applies to Article 3(2) of the DDA and Article 7(1) under (c) of the ADA. All three provisions mirror the core substantive elements of the objective justification test in indirect discrimination cases as laid down in Article 2(2)(b)(i) of Directive 2000/78/EC. This also reflects the case law of the CJEU in indirect discrimination cases, which is followed by the NIHR and the courts.[77]

It is hard to summarise the wide range of possible legitimate aims. However, it is clear that legitimate aims may not be in contradiction with the principle of equality. An example may be Opinion 2007-173, where the then ETC held that a language requirement in a fitness centre in order to prevent customers from feeling intimidated when others talk a different language is not legitimate, because this aim fosters and affirms prejudices which are in contradiction with the principle of non-discrimination. The appropriateness and necessity of a measure is judged by a testing system shaped in case law, too sophisticated to summarise in brief.[78]

---

[73] ETC (2011), *Third evaluation report (2004-2009)*, p. 7.

[74] See Evaluation NIHR Act (*Evaluatie Wet College voor de rechten van de mens*), Tweede Kamer, 2017-2018, 34 338, no. 3, p. 11. In 2011, a case concerning discrimination on the basis of political convictions triggered considerable discussion among equal treatment specialists, where the then ETC found that freedom of expression, as guaranteed in Article 10 ECHR, prevailed over the equal treatment norm; ETC Opinion 2011-69. See for a comment on this case Noorlander, C.W. (2012) 'Godsdienst, Levensovertuiging en Politieke Gezindheid' ('Religion, belief and political opinion') in: Forder, C. (ed), *Oordelenbundel 2011* (NIHR Opinions 2011), Nijmegen, Wolf Legal Publishers, pp. 159-178 and Terlouw, A.B. (2011), 'De CGB en de algemene mensenrechtentoets' ('The ETC and the general human rights test'), in *NTM-NJCM-Bulletin*, 2011, pp. 656-671.

[75] Act of 7 November 2011 (*Wet van 7 November 2011*), *Staatsblad 2011*, 554.

[76] Similar definitions are used in the DDA and ADA, in Article 1(c).

[77] See, for example, NIHR 2014-44 and NIHR 2014-174.

[78] For a brief overview, see Gerards, J. H. (2003), 'Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid' ('The ETC testing model for the assessment of indirect discrimination'), in: *Gelijke behandeling: oordelen en commentaar* (Equal treatment: opinions and commentary), Deventer, Kluwer, pp. 77-95. An extended overview of the Dutch justification tests in equal treatment cases can be found in: Gerards, J. H. (2005), *Judicial review in equal treatment cases*, Leiden/Boston, Martinus Nijhoff Publishers.

2.3.1 Statistical evidence

a) Legal framework

In the Netherlands, there is legislation regulating the collection of personal data. In 2018 existing regulation was replaced by the EU General Data Protection Regulation (GDPR).[79] As a result, the GDPR standards (see in particular article 9 GDPR) regarding data collection of a sensitive nature, such as data on the grounds covered by the EU equality directives, are applicable as of May 2018.

Statistical data can certainly be used for the purposes and under the conditions outlined in the GDPR, including to design and defend positive action measures. Most of the data is generated by the Netherlands Institute for Social Research (*Sociaal en Cultureel Planbureau, SCP*), a governmental research institute that collects data in many fields, and Statistics Netherlands (*Centraal Bureau voor de Statistiek, CBS*).

As far as data collection regarding race is concerned, the Netherlands Institute for Social Research and Statistics Netherlands do not use racial or ethnic origin as statistical categories. Statistics Netherlands collects data on 'persons with a migration background', whereby a distinction is made between 'first generation persons with a migration background' (persons born outside the Netherlands and with at least one parent born outside the Netherlands) and 'second generation persons with a migration background' (persons born in the Netherlands with at least one parent born outside the Netherlands). Subcategories relate to country of origin as well as 'western' or 'non-western' migration background.[80] These data are used by the Netherlands Institute for Social Research, for example a 2019 report on poverty analysed the occurrence of poverty in the Netherlands including in relation to migration background. Sometimes other proxies are used, for example in a 2015 study on labour market discrimination the Netherlands Institute for Social Research conducted situation testing whereby surnames were used as indicators of racial or ethnic origin.[81]

Regarding disability, it is worth mentioning that in the DDA, the legislator has chosen not to define the word 'disability'. The Netherlands Institute for Social Research (SCP), when compiling the data for the (now abolished) 'Disability monitor' ('*Gehandicaptenmonitor'*, a report on the living circumstances of disabled people in the Netherlands), used the International Classification of Functioning, Disability and Health (WHO, 2001).

In the Netherlands, statistical evidence may be admitted under national law in order to establish indirect discrimination. There are no specific conditions for this kind of evidence to be admissible in court.

b) Practice

In the Netherlands, statistical evidence is used in practice in order to establish indirect discrimination. This kind of evidence is used quite often in procedures for the NIHR and is accepted by this body, but it is not known to what extent this is done by the courts, since judgments on equal treatment cases that are issued by (district) courts are not registered (and therefore cannot be researched) separately. There seems to be no reluctance to use statistical data. There are no signs that developments in other countries in the EU influence Dutch case law or the NIHR's Opinions in this respect.

---

[79] General Data Protection Regulation Implementation Act (*Uitvoeringswet Algemene verordening gegevensbescherming*) of 16 May 2018, *Staatsblad* 2018, 144.

[80] See the explanations to Table 'Population according to migration background; sex, age, 1 January', updated 9 July 2019, https://opendata.cbs.nl/statline/#/CBS/nl/dataset/70787ned/table?ts=1581946080498.

[81] Sociaal en Cultureel Planbureau, *Op afkomst afgewezen* (Rejected due to origin), The Hague: SCP 2015, available at https://www.scp.nl/publicaties/publicaties/2015/06/17/op-afkomst-afgewezen.

When using statistical evidence, the NIHR uses the standard consideration that the contested rule or practice predominantly ('*in overwegende mate*') affects a category of people which is protected by one of the non-discrimination grounds.[82] In this context the NIHR stresses that this should not be calculated on the basis of absolute figures, but should be seen relatively. In a number of cases, the then ETC used the standard rule that people in the group alleged to be indirectly discriminated against (e.g. women) should at least be disadvantaged by the apparently neutral rule or practice 1.5 times as often as people from the comparator group. However, from 2004 the ETC no longer explicitly mentioned this standard or criterion. Instead, it started to use other methods of calculation, especially in cases where the (absolute) numbers are very small. This comes down to an extremely complicated way of calculating the chance that one particular group will experience more negative effects than another group.[83] Facts of common knowledge are taken into account, either in the absence of relevant statistics or to support such statistics.[84] However, facts of common knowledge are not accepted as an exclusive means of evidence. Only in clear-cut cases does the NIHR not require statistics or facts of common knowledge.

The former ETC dealt with many indirect discrimination cases in which data collection plays a role. One example is Opinion 2007-91, in which different local communities were compared with respect to their policies as regards granting subsidies to unemployed artists. Although in that case there was a certain statistical correlation between the harshness of the criteria and the compilation of the population (the percentage of the population of immigrant origin), the ETC held that local authorities should have a wide margin of discretion in setting criteria for subsidies.[85] Another example is the case of a man complaining about indirect age discrimination in the area of pay. The then ETC, following the CJEU in *Royal Copenhagen*,[86] states that the single fact that there is a (slight) statistical difference between the salaries of certain age categories of workers is not in itself enough to conclude that there is a case of indirect discrimination. Such statistical evidence may give reason to suspect that there is indirect discrimination, but there needs to be other evidence as well.[87]

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In the Netherlands, harassment is prohibited in national law. It is defined in Article 1(a) of the GETA, which reads as follows:

> '1. The prohibition of distinction as laid down in this Act shall also include a prohibition of harassment.
> 2. Harassment as referred to in the first subsection shall mean conduct related to the characteristics or behaviour as referred to in Article 1(b) and which has the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.
> 3. Article 2, Article 5 subsections 2-6, Article 6a subsection 2 and Article 7 subsections 2 and 3 shall not apply to the prohibition of harassment contained in this Act.' *[These contain exceptions to the prohibition of unequal treatment; i.e. harassment is per se prohibited]*.[88]

---

82 See, for example, ETC 2003-91.
83 Waaldijk, K. 'The Netherlands', in: Waaldijk, K. and Bonini-Baraldi, M. (eds.) (2004), *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*, report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden, Universiteit Leiden, pp. 341-375, available online at: https://openaccess.leidenuniv.nl/handle/1887/12587.
84 Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* ('Equal treatment legislation'), Deventer, Kluwer, pp. 45-49.
85 ETC 2007-91.
86 Case C-400/93, *Royal Copenhagen* [1995], ECR I-1275.
87 ETC 2009-76.
88 Similar provisions are laid down in Article 1 (a) of the DDA and in Article 2 of the ADA.

Similar prohibitions are included in Article 2 of the ADA and Article 1a of the DDA.

In the Netherlands, harassment explicitly constitutes a form of discrimination (see Article 1 sub (a) of the GETA, cited above). Discriminatory treatment, in the sense of offensive attitudes, hate speech or other 'mistreatment', can be examined in addition to harassment. According to Rodrigues, this indicates that the ETC sees harassment as an aggravated form of discriminatory treatment, for which no justifications can be brought forward. For instance, a single case of a discriminatory insult is not enough to constitute a case of harassment, but nevertheless it can be qualified as (prohibited) direct discriminatory treatment.[89]

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in the Netherlands the employer is liable. The prohibition of (sexual) harassment is aimed at the employer or anyone who acts on their behalf. This means that if harassment takes place between colleagues, in principle the victim cannot (under the equal treatment legislation) hold their colleague(s) accountable, but should address the employer. In this case, the victim should state that the employer has not taken sufficient preventive or protective measures and therefore violates the norm that working conditions should be free from discrimination, including (sexual) harassment.

Even if the (sexual) harassment itself is difficult to prove (e.g. because it happened behind closed doors between colleagues), any complaint about this kind of behaviour should be investigated seriously by the employer and adequate protective measures should be taken. Otherwise the norm that the employer should not discriminate as regards (equal) working conditions is considered to have been breached.[90]

The ADA, the DDA and the GETA do not specify to whom the prohibition of making a distinction, including harassment, victimisation and instruction to discriminate, is addressed. Although all three Acts specify the areas of social and economic life to which each Act applies (material scope), the Acts remain silent on the matter of 'personal scope'.[91] With regard to employment, the only area that is covered by all three Acts, the central norm is aimed not only at public and private employers, but also at employers' organisations, workers' organisations, employment offices, (public) recruitment agencies, pension funds, some external advisors, members of the liberal professions, bodies of liberal professionals, training institutions, schools, universities, etc. However, it is not clear from this whether only the official owner or managers of these enterprises or institutions can be held liable under the Acts or whether this also applies to colleagues or third parties.

The matter of personal scope was raised in Parliamentary discussions on the implementation of the directives. It follows clearly from these discussions that the Government did not intend to make the equal treatment legislation applicable in relationships between colleagues, let alone in relationships with third parties.[92] However, it was indicated by the Government that the equal treatment legislation is aimed at those employees who, in the name of their employer, exercise authority over their co-employees.

---

89 Rodrigues, P. R. 'Ras en nationaliteit' ('Race and nationality'), in: Burri, S. D. (ed.) (2006), *Oordelenbundel 2005* ('ETC Opinions 2005'), Nijmegen, Wolf Legal Publishers. An example can be found in NIHR 2018-114, in which the NIHR held that regularly addressing a dark-skinned employee as 'Black Pete' or just 'Black' constitutes direct discrimination on grounds of race.

90 See, for example, ETC 2011-148 and ETC 2011-156.

91 Cremers-Hartman, E. 'Werkingssfeer AWGB (Art. 3, 4 sub c, 5 lid 1, 6, 7 lid 1 AWGB)' ('The scope of the GETA'), in: Asscher-Vonk, I.P. and Groenendijk, C.A. (1999), *Gelijke behandeling: regels en realiteit* (Equal treatment: regulations and reality), The Hague, SDU Uitgevers, pp. 29-88, p. 33.

92 Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19. See also Parliamentary Papers Second Chamber of Parliament, 2002-2003, 28770, no. 5, p. 28.

Such an employee functions *de facto* in the capacity of employer.[93] The purported inapplicability of the Dutch equal treatment acts in relationships between colleagues inter se, appears particularly problematic in the context of work-related *(sexual) harassment*. In its current format and in the light of the Parliamentary comments, the equal treatment laws prevent an alleged victim of harassment from holding a colleague or a third party directly liable for the contested behaviour under these laws. The only way to do this would be by seeking recourse to the general provisions of tort law enshrined in the Dutch Civil Code: victims of discrimination by colleagues or third parties can always bring a claim under tort law provisions in the general Civil Code and claim damages or a court injunction under this law. Furthermore, Article 429quater Criminal Code prohibits discrimination by individuals in the exercise of their function, profession or enterprise. This provision could be interpreted to cover harassment by colleagues or third parties and serve as a basis for criminal liability, however it is rarely invoked in practice and no relevant case law is available.

The employer's vicarious liability for acts of harassment by a third party was, for example, at issue in ETC Opinion 1997-82.[94] The ETC repeated its stance that the employer is under a legal duty to prevent acts of harassment by persons under their supervision. It took the view that, although the alleged acts of harassment were not perpetrated by a colleague, but by a third party, this did not in any way circumscribe the employer's duty of care. Moreover, and this also follows from the ETC's case law prior to the implementation of the directives, a *general duty of care* rests upon the employer to maintain a discrimination-free and safe workplace. An employee's right not to be discriminated against in his or her employment and working conditions embraces the right to be free from discrimination and harassment in the workplace.[95]

Beyond the scope of Dutch equal treatment legislation, it is essential that the following be taken into account. The employer may be held vicariously liable for discriminatory acts or harassment perpetrated by colleagues under employment law. The relevant articles upon which a claim can be based are (a) good employer practice (Article 7:611 of the Civil Code); and (b) the employer's general duty of care (i.e. the employer's liability for damages suffered by an employee in the performance of job-related duties, laid down in Article 7:658 of the Civil Code). Both of these articles are directed at the employer's liability for acts perpetrated by the employer themselves or by others over whom the employer has control.

In the past it was much disputed whether Article 7:658 of the Civil Code could form the legal basis for claims that concern mere psychological damage, rather than physical damage.[96] It is a fact that damage resulting from discriminatory treatment and harassment is most often psychological. In 2005 the Supreme Court accepted that Article 7:658 Civil Code can include psychological damage.[97] The lower courts have accepted that, in cases

---

93 Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19.

94 This case concerned the racial harassment of a nurse by a patient. Employers were equally held liable in some court cases. See Holtmaat, R. (2009) *Seksuele intimidatie, de juridische gids* (Sexual harassment: legal guide), Nijmegen, Ars Aequi Libri, Chapter 6. See also ETC 2004-128 and NIHR 2012-197.

95 See, for example, ETC 2004-08. See also Asscher-Vonk, I. P. and Monster, W. C. (2002), *Gelijke behandeling bij de arbeid* (Equal treatment in employment), Deventer, Kluwer, p. 164.

96 Geers, A. 'Intimidatie op de werkplek' ('Harassment in the workplace'), in: van Maanen, G. (ed.) (2003), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed* (The role of liability law in processing personal suffering), Den Haag, Boom, pp. 183-198, at p. 188, with further references to the literature on this question. See also Vegter, M. S. A. 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer' ('Liability of the employer for psychological harm to the employee caused by sexual harassment'), in: *Aansprakelijkheid, verzekering en schade* (Liability, insurance and damage) no. 5, October 2001, pp. 133-140, at p. 134. With regard to Article 7:611 of the Civil Code, the Supreme Court has decided that this article may be relied upon to claim compensation for damages of only a psychological nature. See Supreme Court, 11 July 1993, *NJ* 1993/667 (*Nuts/Hofman*), ECLI:NL:HR:1993:ZJ 1032.

97 Supreme Court, 11 March 2005, *RvdW* 2005/37 (*ABN AMRO / Nieuwenhuys*), ECLI:NL:HR:2005:AR6657.

of sexual harassment, this article can form the basis for financial compensation of psychological damage resulting from such behaviour.[98]

In the light of the presumed broad scope of the personal applicability of Directives 2000/43/EC and 2000/78/EC, it appears that the Dutch Government's view that the Dutch non-discrimination acts are aimed at employers and other organisations but not at employees (and third parties) is unduly restrictive. According to the case law of the ETC (now the NIHR), the person exercising authority may be held responsible for acts of distinction, including harassment by employees or third parties (provided they do not take appropriate action against such offences). According to the case law of the Dutch civil courts (including the Supreme Court), these individuals can also be held responsible and accountable under general civil law provisions/procedures.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In the Netherlands, instructions to discriminate are prohibited in national law, but are not explicitly defined. Instructions to discriminate are covered by Article 1(a) GETA, Article 1(a) ADA and Article 1(a) DDA. The prohibition of issuing an instruction to discriminate is applicable for the whole scope of the equal treatment legislation (as far as the GETA and the DDA are concerned, this covers more than employment and employment-related education and training, extending also to goods and services and (with respect to race) social security and social benefits).[99]

In the Netherlands, instructions explicitly constitute a form of discrimination. Article 1(a) GETA and the counterpart provisions in the ADA and DDA define 'distinctions' as: 'direct or indirect distinctions, as well as instructions to make a distinction'. Prior to the implementation of the directives, a prohibition of the instruction to make a distinction was implied within the GETA. However, to avoid any misunderstanding, the phrase 'as well as instructions to make a distinction' was added through the EC Implementation Act.[100]

It has been indicated by the Government that the notion of instruction refers to '*opdracht*' in the meaning of Article 7:400 of the Civil Code. This article regulates the law on contracts for the provision of services.[101] In the Explanatory Memorandum to the ADA, the Government mentions the example of an employer who instructs a recruitment agency to select only people under the age of 30 (without a sound justification for this). According to the Explanatory Memorandum, in such a scenario, both the person who gives the contested instruction and the person who carries out the instruction violate the non-discrimination norm. If the 'recipient' of the instruction refuses to abide by it and, as a consequence thereof, suffers damages, they can hold the person who gave the instruction liable for it.

According to the Government's explanation, an instruction which has been given within the employment relationship (e.g. if a director instructs a member of the personnel department to recruit only young people) is not covered by the prohibition of instruction to make a distinction. In the Government's view, such a scenario is covered by the exercise of authority by the employer over the employee within the employment relationship ('*gezagsuitoefening in het kader van de arbeidsovereenkomst*'). Any distinction that might occur within this exercise of authority can only be attributed to the employer and excludes

[98] See Vegter, M. S. A. 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer' ('Liability of the employer for psychological harm to the employee caused by sexual harassment'), in: *Aansprakelijkheid, verzekering en schade* (Liability, insurance and damage) no. 5, October 2001, pp. 133-140, at pp. 134-135. See also Holtmaat, R. (2009) *Seksuele intimidatie; de juridische gids* (Sexual harassment: legal guide), Nijmegen, Ars Aequi Libri.

[99] Examples of cases where the ETC found that there was a case of 'instruction to discriminate' are ETC 2006-82, 2007-211, 2009-40, 2010-95, 2010-179, 2012-30, 2012-37 and 2012-43.

[100] Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 7.

[101] Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p.18.

the employee.[102] This interpretation is followed by the ETC (now the NIHR).[103] This reasoning might fall short of what the EU legislator had in mind with the prohibition of instruction to discriminate. Arguably, on this point the Dutch Government interprets the prohibition of an instruction to make a distinction unduly narrowly.

The then ETC suggested that the prohibition of instruction to make a distinction should also include a prohibition of the passive toleration of an existing discriminatory situation or act.[104] This advice was not followed by the Government. It maintained its position that an instruction to make a distinction implies active rather than passive behaviour. This is a narrow interpretation of the verb 'to instruct'. The Government has nevertheless indicated that the toleration of existing discriminatory conduct or acts might still be covered by the prohibition of making (direct or indirect) distinctions.[105] The then ETC, as well as the NIHR, has applied its own interpretation and has also covered situations where there was no explicit instruction, and / or where an employer allowed a temporary work agency to discriminate, under this prohibition.[106]

In addition, the instruction to discriminate on grounds of race, religion/belief, sex or homo- or heterosexuality can also be subject to criminal prosecution under Article 137d of the Criminal Code. Moreover, 'scornful blasphemy' ('*smalende godslastering*') used to be prohibited in a separate article, namely Article 147 of the Criminal Code, but this provision was revoked in 2013.[107] The significance of this repeal lies in its symbolic meaning more than in its practical effects, as the provision had already been a 'dead letter' for decades.

b) Scope of liability for instructions to discriminate

In the Netherlands, the instructor is liable, but the discriminator is not. The employer may be held liable under employment law for discriminatory acts or harassment perpetrated by workers. The relevant articles upon which a claim can be based are Articles 7:611 and 7:658 of the Civil Code. Both of these articles are directed at the employer's liability for acts perpetrated by the employer themselves or by others over whom the employer has control. In 2005 the Supreme Court accepted that Article 7:658 of the Civil Code can include psychological damage.[108] The lower courts have accepted that, in cases of sexual harassment, this article can form the basis for financial compensation of psychological damage resulting from such behaviour.[109] Individuals who perpetrate acts of discrimination because of an instruction to do so will normally fall under the scope of Article 7:658 of the Civil Code, i.e. the employer will be held liable. We have not found any case law indicating the contrary.

Article 429quater Criminal Code prohibits discrimination by individuals in the exercise of their function, profession or enterprise. This provision could be interpreted to cover instructions to discriminate. However, it is rarely invoked in practice and no relevant case law is available.

---

[102] Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19.
[103] ETC (2011), *Third evaluation report (2004-2009)*, p. 30.
[104] ETC Advice 2001-03, p. 6 and 2001-04, p. 4.
[105] Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p.18.
[106] ETC (2011) *Third evaluation report (2004-2009)*, p. 30. The ETC mentions Opinion 2005-154 as an example of such a case. See also several opinions of the NIHR, such as 2012-175/176/177.
[107] Tweede Kamer, 2012-2013, 32 203, no. 8.
[108] Supreme Court, 11 March 2005, *RvdW* 2005/37 (*ABN AMRO / Nieuwenhuys*), ECLI:NL:HR:2005:AR6657. See, on this case: Houben, E. J. 'Schadevergoeding bij zuiver psychisch letsel' ('Compensation for exclusively psychological damage') in *Arbeidsrecht* (Employment law) 2006, no. 2. p. 31-36.
[109] See Vegter, M. S. A., 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer' ('Liability of the employer for psychological harm to the employee caused by sexual harassment'), in: *Aansprakelijkheid, verzekering en schade* (Liability, insurance and damage) no. 5, October 2001, pp. 133-140, at pp. 134-135. See also Holtmaat, R. (2009) *Seksuele intimidatie; de juridische gids* (Sexual harassment: legal guide), Ars Aequi Libri, Nijmegen.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In the Netherlands, the duty to provide reasonable accommodation is included in the law and is defined in Article 2 of the DDA, which reads as follows:

> 'The prohibition of making a distinction also includes the duty for the person to whom the prohibition is addressed to make effective accommodations in accordance to the need for this, unless doing so would constitute a disproportionate burden upon him or her.'

Instead of the term 'reasonable', which is the term used in Article 5 of the directive, Article 2 of the DDA employs the term 'effective' ('*doeltreffend*'). In the Government's view, the latter term reflects better than the term 'reasonable' the fact that an accommodation must have the desired effect.[110] The aspect of reasonableness is reflected in the second part of the provision, in the sense that there is no obligation to accommodate if doing so would constitute a disproportionate burden (i.e. would not be reasonable).

b) Practice

The test of whether an employer is under a duty to provide accommodation for a disabled person who requires it runs as follows:[111]

Is the accommodation that has been asked for 'effective'?

This means that two separate questions need to be answered:

- Is the accommodation that has been asked for *appropriate*: does it really enable the disabled person to do the job?
- Is the accommodation that has been asked for *necessary* (is it a pre-condition to do the job)?

If the conclusion is that no accommodation could be effective to help the disabled person do the job properly, the request will be denied. If the answer to both questions is 'yes', the second part of the test will follow. The outcome of this first part of the test may be that another (e.g. cheaper) accommodation than that requested could also be effective and would help the disabled person to stay in the job or to do the job.[112] In this case, the second part of the test will focus on this particular cheaper accommodation.

Can the employer reasonably be expected to provide this particular accommodation?

This concerns the question of whether supplying the accommodation puts a disproportionate burden on the employer. National law does not define what this would be. However, there are some indicators. According to the Explanatory Memorandum to the DDA, this 'balancing exercise' between the interests of the disabled person versus those of the employer must be carried out in the light of 'open norms' of civil law (i.e. the duty of the good employer and the notion of 'reasonableness' in civil law).[113] If financial

[110] Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 25.
[111] Concluded from the Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3.
[112] Indeed this approach was followed by the NIHR in Opinion 2016-18. The case concerned a civil servant who could not access the Ministry of Finance through the main, secured door because of his obesity. Though he did not agree with the solution provided by the Ministry (that is to use a side door available for disabled people) the NIHR held the accommodation provided was effective. The Ministry did not have to provide the much costlier alternative preferred by the employee.
[113] Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 25-30.

compensation (e.g. a subsidy) exists for the realisation of the effective accommodation, it cannot be regarded as 'disproportionate'.[114] Financial compensation is, for example, offered through Article 36 of the Work and Income according to Labour Capacity Act (WIA). The Government also highlighted Consideration 21 of the Preamble to Directive 2000/78/EC[115] and added as an additional criterion that the duration of the employment contract may be a weighty factor.[116]

The NIHR is strict in its assessment of the employers' efforts to provide reasonable accommodation. The employer must actively investigate the possibilities of providing effective accommodation. A lack of proper investigation also amounts to discrimination in violation of the DDA.[117]

c) Definition of disability and non-discrimination protection

Disability is not explicitly defined in Dutch equal treatment law. There are no signs that the concept of disability is applied in different ways in cases of non-discrimination protection in general, on the one hand, and the right to claim reasonable accommodation, on the other hand.

A final note concerns the explicit statement by the then ETC[118] that the employer's defence that they do not make a distinction in any way between disabled and non-disabled people does not mean that they comply with the DDA. Equal treatment in unequal (labour) circumstances may lead to inequality, according to the ETC. In many of the cases on the ground of disability that come before the equality body an appeal to the obligation to provide reasonable accommodation is made. Often the ETC found that this duty had indeed been breached.[119]

d) Failure to meet the duty of reasonable accommodation for people with disabilities

In the Netherlands, failure to meet the duty of reasonable accommodation counts as discrimination or, more specifically, as a form of prohibited distinction, for which the ordinary sanctions can be imposed.[120] However, the text of Article 2, in conjunction with that of Article 1 (definitions of direct and indirect distinction) and Article 3 DDA (regarding the exceptions to the central norm), does not shed light upon the question of whether a failure to provide an effective accommodation constitutes direct, indirect or a third type of distinction.[121] With regard to the duty to provide an effective accommodation, Article 2 of the DDA states that if making an accommodation constitutes a *disproportionate* burden on the employer, then the duty does not exist (cf. Article 5 of Directive 2000/78/EC). In the amended DDA, in Article 6c the exception is made that Article 2 (concerning the duty to provide an effective accommodation) is not applicable if it would require reconstruction or building work in or around a residential building.

---

[114] This follows from the Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 28. However, this is not explicitly mentioned in Article 2.

[115] This Consideration focuses on the factors to be considered when determining whether making a reasonable accommodation would amount to a disproportionate burden.

[116] It is submitted that this might, however, trigger indirect *sex* discrimination, since women are more likely than men to be employed on the basis of a fixed-term contract.

[117] See e.g. NIHR opinions 2014-1 and 2014-2; 2018-2; 2018-70; 2018-148.

[118] ETC 2005-160.

[119] A quick search for the term '*doeltreffende aanpassingen*' (effective adjustments) reveals that in 2015 16 such cases were decided by the NIHR; in six of these cases the body found that the norm had been violated.

[120] See ETC 2004-140, where it held: 'It concerns a sui generis form of (making a) distinction, which does not yet occur in the other equal treatment laws.' In this Opinion, the ETC seems to suggest that the duty to provide reasonable accommodation should also be included in the sex equality laws, the GETA and the ADA.

[121] See Waddington, L. and Hendriks, A. 'The expanding concept of employment discrimination in Europe: from direct and indirect discrimination to reasonable accommodation discrimination', in: *International journal of comparative labour law and industrial relations*, Winter 2002, pp. 403-427.

Article 3(1) DDA[122] enshrines three general exceptions to the central norm (i.e. the prohibition of making a distinction, which on the basis of Article 2 also includes the duty to provide effective accommodations). In brief, the exceptions are public security and health, supportive social policies, and positive action measures. Thus, a textual reading of Article 3(1) DDA suggests that these three general exceptions could also 'lift' the effective accommodation duty, as this falls within the central norm. However, logically and in accordance with what the Government observed in its Explanatory Memorandum, only the exception concerning public security and health can have the effect of 'lifting' the duty enshrined in Article 2.[123] Consequently, the other two exceptions mentioned cannot be invoked by employers with respect to their effective accommodation duty. It is indeed difficult to perceive in what ways the other exceptions could be applicable in a case concerning the failure to provide effective accommodation.

e) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In the Netherlands, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field. Originally, the DDA only covered employment and vocational education. However, in 2009 the Dutch legislator passed laws to extend the scope of the DDA to housing from 15 March 2009 and to primary and secondary education (Articles 6a-6c DDA) from 1 August 2009.[124] In 2016 the DDA was extended further in parallel with the ratification of the CRPD and now includes the entire field of goods and services, although some specific restrictions still apply to public transport (Article 7 DDA) and housing (Articles 6a-c DDA).

The duty to provide reasonable accommodation in the field of housing is restricted. Article 6c of the DDA states that Article 2 (concerning the duty to provide effective accommodation) is not applicable if it would require reconstruction or building work in or around a residential building.

The first ETC opinion concerning the duty to provide reasonable accommodation outside the area of employment was issued in 2010.[125] Since then, many cases that have come before the NIHR have concerned reasonable accommodation in the area of (vocational) education. This is caused (inter alia) by the fact that mainstream schools are obliged to admit children with a disability unless they can prove they are unable to provide adequate education.

In the field of education, there also exist provisions for a certain amount of money to be made available for parents of children with disabilities in order to enable their schools to make adjustments and provide special assistance for their children. From 2014 onwards, these provisions were changed. The money no longer goes to the parents, but goes directly to the schools. An example of the right to accommodation in the field of education is the right to have adaptations made to state exams, such as an exam paper printed in a larger font or an extension of the time allowed for an exam, in order to meet the needs of students with dyslexia or motor disabilities.

The first opinion of the NIHR on the duty to provide effective accommodation in the wider field of goods and services dates from late 2016. It concerned a notary office charging additional costs to a hearing-impaired client as it was claimed doing business with her would be more time-consuming. The NIHR concluded the notary office violated the duty of reasonable accommodation set out in the DDA as there was not sufficient evidence that the additional time needed would be so much as to pose a disproportionate burden on the

[122] Article 3(2), moreover, stipulates that indirect distinction can be objectively justified.
[123] Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 33.
[124] Tweede Kamer, 2008-2009, 30 859.
[125] See ETC 2010-35, and ETC 2011-30, in which the ETC reached the same conclusion.

notary office.[126] More opinions followed in 2017 and 2018, thus providing the opportunity for the NIHR to further develop its jurisprudence in this area. Importantly, the NIHR applies the requirement of 'reasonable accommodation' in a very strict way and demands a high level of accommodation that ties in closely with the specific wishes of the person in need of the accommodation.

The case of a blind woman who wished to shop at a branch of Kruidvat, a large chain of drugstores, is a good example of this strict approach.[127] The woman asked to be taken by the arm and guided through the shop so she could browse and select from the range of products herself. However, the staff would not go further than offering to collect the things on her shopping list and bring them to her. The NIHR concluded that Kruidvat violated its duty of reasonable accommodation under the DDA. It held that the accommodation offered by Kruidvat was not sufficient, in particular because Kruidvat had not really investigated whether providing the accommodation in the way the blind woman preferred herself would indeed impose a disproportionate burden. In this respect, and referring to the Parliamentary discussion on the extension of the DDA in the context of the ratification procedure of the CRPD, the NIHR emphasised that the purpose of the obligation to provide reasonable accommodation is to realise the autonomy of disabled people to the greatest extent possible.[128]

Arguments concerning public security and health are also met with strict review. Thus the NIHR did not accept the argument of a public transport company that a person in an electric wheelchair could be refused the right to use a regular bus service because the weight of the chair poses a health and safety risk. The company could not sufficiently substantiate its claim.[129]

This is not to say there are no limits to what can be expected of the duty bearer. Thus a school was not considered to violate its duty of reasonable accommodation towards a pupil with Down syndrome as its substantial efforts to accommodate the pupil's needs had been sufficient and further accommodation would pose a disproportionate burden on the school.[130] At the same time, a school violates its duty of reasonable accommodation if it refuses to accommodate pupils with Down syndrome as a matter of general policy without carefully examining each individual case.[131]

Accessibility of services, buildings and infrastructure

In the Netherlands, national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. No general legal obligation exists to always guarantee accessibility for disabled people or to take anticipatory measures (for example, structural adaptations of buildings). However, since 1 January 2017, Article 2a DDA has provided for a duty to ensure accessibility for people with disabilities at least gradually (*'geleidelijk'*), unless this creates a disproportionate burden. This provision is discussed in more detail below. With regard to public spaces and buildings in which public offices and social services are located (education, healthcare and other general services), there are some specific regulations. The Ministry of Infrastructure and the Environment issued a decree stipulating construction requirements (*Bouwbesluit*).

[126] NIHR 2016-136.
[127] NIHR 2017-104.
[128] A court judgment was later issued in the same case in which the court also found that the shop had failed to provide reasonable accommodation correctly (District Court of Central Netherlands, 24 December 2019, ECLI:NL:RBMNE:2019:6305), see Section 12.2.
[129] NIHR 2016-39.
[130] NIHR 2017-41. The pupil had received specific and individual help and guidance to facilitate his participation at a mainstream school for eight years. At some point his development deteriorated and he started to exhibit inappropriate behaviours, such as yelling, anger and running away. The way in which the pupil was supported was adjusted, but this did not improve the situation. After some time the school decided to refer the pupil to the special education system as the school considered it was no longer feasible to further accommodate the pupil's specific needs.
[131] NIHR 2018-81.

This decree contains some requirements about the accessibility of public buildings. A similar decree exists relating to the construction of buses and trains. The Ministry of Education, too, has issued detailed instructions as to how to build schools, as did the Ministry of Health, concerning hospitals and medical centres.

A failure to comply with such legislation cannot be relied upon in a discrimination case, based on the DDA, except for cases where reasonable accommodation has been requested by a disabled person and the employer or school board was already – under this other legislation (not the DDA) – obliged to provide this particular facility (e.g. having a door wide enough for wheelchairs). When such other legislation exists, the employer or school board can never state that the accommodation is not 'reasonable'.

Regarding public transport, this area was included in the DDA, but the respective Articles 7 and 8[132] did not enter into force immediately. In 2011, a Decree elaborating Articles 7 and 8 DDA was adopted.[133] Articles 7 and 8 of the DDA entered into force in 2012, meaning that the DDA effectively came to cover public transport as well. However, the Decree that gave effect to these articles contains a complicated schedule of gradual implementation.[134] In fact, it will take until 2030 before the entire public transport sector (apart from transport on ferries) will actually fall under the scope of the DDA.

In the Netherlands, national law contains a general duty to provide accessibility by anticipation for people with disabilities. As of 1 January 2017, Article 2a(1) DDA puts a general duty on all those bound by the DDA to improve accessibility for people with disabilities in addition to the duty to provide reasonable accommodation in individual cases.[135] As the DDA covers not just employment, but also access to goods and services including housing and education, the scope of this provision is wide. Inclusion in the DDA does not seem to imply that the NIHR has the competence to receive individual complaints regarding the implementation of this provision, as this competence is expressly limited to assessing discrimination claims as such.[136] Yet, in opinion 2018-55 the NIHR held differently by considering itself competent to also address complaints regarding this general duty to provide accessibility.[137] For disabled people this opinion is highly significant, as it means they can bring complaints regarding a wide range of general accessibility issues to the NIHR.[138] In addition the NIHR can, of course, play a monitoring function under its general human rights mandate.

The proactive, general duty entails the duty to ensure accessibility for people with disabilities at least gradually ('*geleidelijk*'), unless this creates a disproportionate burden.

---

[132] Article 7 defines the term 'public transport'. In Article 8, unequal treatment in public transport is prohibited. Article 8 section 2 contains an obligation to make adaptations in order to make public transport accessible for disabled people.

[133] Netherlands, Decree on accessibility in public transport (*Besluit toegankelijkheid van het openbaar vervoer*), *Staatsblad 2011*, 225.

[134] See the Decree of 19 April 2012, *Staatsblad 2012*, 199, entitled 'Concerning the establishment of a date of the entry into force of Articles 7 and 8 of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease and the entry into force of the Decree on accessibility public transport' (*Houdende het tijdstip van inwerkingtreding van de artikelen 7 en 8 van de Wet gelijke behandeling op grond van handicap of chronische ziekte en inwerkingtreding van het Besluit toegankelijkheid van het openbaar vervoer*).

[135] This amendment of the DDA was already adopted in 2016 as part of the acts on ratification and implementation of the Convention on the Rights of Persons with Disabilities, but its entry into force was postponed to 1 January 2017. See https://zoek.officielebekendmakingen.nl/stb-2016-215.html.

[136] Article 12 DDA.

[137] NIHR Opinion 2018-55. The NIHR does not provide an explanation for this approach.

[138] Though in the case at hand it did not help the complainant. The case dealt with making subtitling available from the original release and distribution of a video. This would optimally achieve the goal of providing general access for hearing impaired people. The NIHR acknowledges this, but also points out that Article 2a DDA specifically provides for the gradual realisation of such access. As the subtitling had become available several months later, the distributor cannot be considered to have violated this provision.

To further implement this provision a Ministerial Decree was adopted and entered into force on 21 June 2017.[139]

The Decree stipulates in Article 6 that the duty of gradual ensuring accessibility entails at least the duty to provide 'simple' facilities (*'voorzieningen van eenvoudige aard'*), that is easily implemented facilities in terms of effort and cost, and gradually to provide for general accessibility for people with disabilities, unless this entails a disproportionate burden. The former means that easily implemented measures to ensure accessibility must be taken immediately. As regards the latter, the crucial question is how much leeway the 'disproportionate burden' criterion will leave for justifying exceptions to the general duty to ensure accessibility. In addition, the Decree requires the Minister of Justice and Security to promote the development of action plans to ensure general accessibility in all the sectors covered by the DDA in cooperation with representative organisations of people with disabilities (Article 2), to monitor the gradual implementation of general accessibility, and to report to Parliament on the progress made on a yearly basis.[140]

The general duty for the gradual implementation of accessibility introduced in 2017 also applies to access to information and communication. Many public websites feature the possibility to have the text read out loud (using the 'read' button). The Government has indicated the need to strive for accessibility,[141] but in 2015 a report commissioned by the NIHR found that many local council websites still did not adhere to the accessibility standards.[142] The general impression of the author of this report is that increasing efforts are being made, yet there remains considerable room for improvement.

f) Duties to provide reasonable accommodation in respect of other grounds

In the Netherlands, there is no legal duty to provide reasonable accommodation in respect of other grounds than disability in the public and/or the private sector. The NIHR or the courts may extend this in the future, but no such case law has yet been seen.

However, when (in the case of indirect discrimination) the proportionality of a certain unequal treatment (with a legitimate aim) is tested in case law, an implicit duty might sometimes be identified to provide reasonable accommodation, although this is not made explicit. This is of particular interest in relation to the accommodation of religious expression by people with a migration background, who often adhere to a religion containing prescriptions regarding dress codes and similar practices. Thus it has been established that, as a general rule, employers must accommodate the wishes of their employees to wear a headscarf or other religious symbol at work. The NIHR reviews strictly any objective justification put forward for not allowing this.[143] The 2017 preliminary rulings of the CJEU in the cases *Achbita* and *Bougnaoui* regarding a headscarf ban by a private

---

[139] Decree on General accessibility for persons with a disability or chronic illness (*Besluit algemene toegankelijkheid voor personen met een handicap of chronische ziekte*) of 7 June 2017, *Staatsblad* 2017, 256 of 20 June 2017, http://wetten.overheid.nl/BWBR0039653/2017-06-21.

[140] The latest monitor is published as Annex to Tweede Kamer 2019/2020, 24 170, nr. 201. The monitoring and reporting to Parliament ties in with the yearly reports on and monitoring of the implementation of the CRPD, in which the NIHR also takes an active role. See the progress report submitted to the CRPD supervisory body, NIHR 3 December 2018 'Submission to the committee on the Rights of Persons with Disabilities Concerning the initial report of the Netherlands': https://mensenrechten.nl/nl/publicatie/38664.

[141] Tweede Kamer 2012-2013, 26 643, no. 260 and no. 276.

[142] Tweede Kamer 2014-2015. 26 643, no. 366, attachment 2015D20740.

[143] The standards developed in the jurisprudence of the former ETC have been laid down in several guidelines, see e.g. *Advies 2004/06 inzake Arbeid, religie en gelijke behandeling* (Advice 2004/06 concerning Employment, religion and equal treatment); *Advies 2008/03 inzake gelijke behandeling in het onderwijs: 'Naar een discriminatie vrije school'* (Advice 2008/03 concerning equal treatment in education: 'Towards a discrimination-free school'. Available on the website of the NIHR. See www.mensenrechten.nl/publicaties/detail/9929. Subsequent opinions by the NIHR confirm it keeps applying the objective justification test strictly, as is borne out by Opinion 2016-45 discussed below, in which it did not accept the arguments regarding state neutrality as a justification for not allowing a law clerk to wear a headscarf in court.

employer[144] do not seem to induce the NIHR to adjust this approach, even if the Dutch media generally reported that the rulings would allow employers to prohibit the wearing of a headscarf at work.[145] In its response to the rulings the NIHR emphasised that they should not be interpreted as giving employers a free hand to ban headscarves from the workplace.[146]

Similarly, employers have to accommodate other religious expressions. In ETC Opinion 2006-202 it was considered that a municipality had failed to seek alternative ways of greeting people within the organisation. Therefore, the applicant could not be rejected for a job solely because he refused to shake hands when greeting people of the opposite sex because of his Muslim faith. This opinion was very controversial and was not followed by the District Court of Rotterdam, which considered that, given the important role the applicant would have as a contact person between citizens and the local authority, the municipality could require its personnel 'to observe the usual rules of etiquette and of greeting customs in the Netherlands'. In this setting the court held that the refusal to employ the applicant was justified.[147] The highest administrative court in the Netherlands rendered a similar judgment in a case of a school teacher who was dismissed because of her refusal to shake hands with male colleagues or students.[148] These court decisions seem to have induced the NIHR to allow more leeway for employers to refuse to accommodate religious expressions in this specific type of case. In its opinion 2018-140 the NIHR explicitly refers to the latter judgment to conclude that a school which refused to accept an intern because of her unwillingness to shake hands with members of the opposite sex did not violate the GETA.[149]

Similarly controversial is the wearing of a face-covering veil such as a niqab. A proposal for prohibiting face-covering clothing in a number of specific areas, such as education, public transport, public buildings and healthcare, was adopted in 2018.[150]

Refusals to accommodate religious attire in public employment for reasons of state neutrality are also submitted to a strict test by the NIHR. Thus it held that a district court violated the GETA by not allowing an external law clerk to assist in court sessions while wearing a headscarf. The NIHR reasoned that as a law clerk does not belong to the judiciary as such the prohibition was not objectively justified.[151] The judiciary does not accept this approach and abides by its policy. Regarding police officers, the NIHR also applies a strict test to assess whether a ban on the wearing of a headscarf with the police uniform can be justified because of police policy to strive for a 'lifestyle neutral' appearance. In a case it dealt with in 2017 the complainant was employed as an 'intake and service assistant'. As

---

144 Case C-157/15, *Achbita v. G4S*, 14 March 2017; Case C-188/15 *Bougnaoui and ADDH v. Micropole,* 14 March 2017.

145 See e.g. one of the main Dutch national newspapers: www.nrc.nl/nieuws/2017/03/14/europees-hof-staat-hoofddoekverbod-op-werk-toe-a1550188.

146 NIHR *'Uitspraak Hof van Justitie geen vrijbrief om hoofddoek van werkvloer te weren'* (Court of Justice judgment is not a licence to ban the headscarf from the workplace): www.mensenrechten.nl/berichten/uitspraak-hof-van-justitie-geen-vrijbrief-om-hoofddoek-van-werkvloer-te-weren. Opinion 2018-24 confirms that the NIHR has not modified its approach in this regard.

147 Translation by the author; Rechtbank Rotterdam, 6 August 2008, ECLI:NL:RBROT:2008:BD9643. On appeal this outcome was confirmed by Gerechtshof 's-Gravenhage, 10 April 2012, ECLI:NL:GHSGR:2012:BW1270.

148 *Centrale Raad van Beroep* May 2009, ECLI:NL:CRVB:2009:BI2440. https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CRVB:2009:BI2440.

149 NIHR Opinion 2018-140.

150 Partial prohibition of face-covering clothing Act (*Wet gedeeltelijk verbod gezichtsbedekkende kleding*), see Law Gazette (*Staatsblad*) 2018, 222. The law provides for exceptions to the prohibition where face-covering dress is necessary for reasons of health and safety or requirements connected to the performance of a job or sport, or is appropriate in respect of participation in festive and cultural events. In addition, the prohibition does not apply to clients, patients or their visitors in residential parts of care institutions as these places can be perceived as their private domain. The prohibition is sanctioned by payment of a fine of up to EUR 400. The law did not take effect immediately, to allow for consultation with the sectors concerned on its implementation and on the communication of the new standards to the people using such services or visiting such facilities. The period for this consultation was not fixed and, at the time of finalising this report, the prohibition had not yet taken effect.

151 NIHR 2016-45. This opinion in fact confirmed an earlier opinion by the then ETC, opinion 2001-53.

such she recorded statements by citizens who want to file a police report through a 3D video connection. The NIHR accepts the legitimacy of the goals put forward for the dress policy but, given the specific circumstances of the case, it does not consider the application of this policy necessary and thus deems it not to be objectively justified. The NIHR considers, in particular, that in view of the administrative character of the work performed, the argument of neutrality is of limited relevance.[152] The police leadership has indicated it will not follow this outcome.

In a similar vein, the then ETC required local councils to provide 'solutions' for civil servants who have religious objections to celebrating same-sex marriages.[153] However, it reversed this position in Opinion 2008-40. After much debate, several bills and advice from the Council of State, an amendment to Article 1:16 of the Civil Code was adopted in 2014 which made it impossible to appoint new civil servants who refuse to serve as registrars to same-sex couples.[154] The priority thus given to non-discrimination on grounds of sexual orientation over religious freedom was accepted in a ruling of the Central Appeals Tribunal of 2016, where the Tribunal considered that the Dutch legislation is compatible with Articles 9 (freedom of religion) and 14 (prohibition of discrimination) of the ECHR.[155]

[152] NIHR 2017-135.
[153] ETC 2002-25 and 2006-26.
[154] This Act also provided for a provision conveying the same message to be included in the GETA (Article 5(2a)); See Law Gazette (*Staatsblad*) 2014, 260.
[155] This case concerned a dismissal for refusing to register same-sex marriage; see Central Appeals Tribunal (*Centrale raad van Beroep*), 29 February 2016, ECLI:NL:CRVB:2016:606: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CRVB:2016:606.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

In the Netherlands, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. The principle in Dutch law is that 'all persons in the Netherlands shall be treated equally in equal circumstances', as provided for in Article 1 of the Constitution. Thus, the protection against discrimination provided by criminal law, civil law, equal treatment legislation and administrative law covers any person on the territory of the Netherlands. This wide personal scope means that, in principle, migrants, regardless of their immigration status, are protected by the broad range of non-discrimination law if they encounter discrimination on grounds of, for instance, their race or ethnic origin, or their religion. An example can be found in a case brought to the NIHR, the national equality body, in which several people alleged they had been singled out by the local authorities because of their Egyptian and Somali origin for a fraud investigation regarding the social benefits they received. The NIHR accepted this could amount to discrimination on grounds of race.[156]

However, whereas irregularised migrants are not expressly excluded from the scope of Dutch anti-discrimination law, they are excluded from legal employment[157] and are not entitled to use public services such as housing, healthcare or social protection.[158] It follows that they do not have legal access to many of the fields in respect of which the anti-discrimination legislation applies. Limitations also exist with regard to the rights of migrants with temporary residence permits: their access to employment and public services depends on the purpose for which they have been admitted. These legislative restrictions on the rights of (irregularised) migrants are not themselves subject to the equal treatment legislation as the GETA covers nationality discrimination only in horizontal relationships (see further Section 4.4).

3.1.2 Natural and legal persons (Recital 16 Directive 2000/43)

a) Protection against discrimination

In the Netherlands, the personal scope of anti-discrimination law does not cover (certain) legal persons for the purpose of protection against discrimination. For the purposes of protection against discrimination only natural persons are protected. This follows from the Memorandum of Reply to the GETA, where the Government explained that the definition of 'distinction' in Article 1 GETA refers to making a distinction *between persons*.[159] However, where a group of natural persons is collectively subject to discrimination (e.g. when an association of professionals, a political association / party or a religious organisation is refused a contract for hiring a meeting room in a hotel), their organisation may be seen as the rights holder, according to the then ETC in a number of its Opinions.[160] These cases all concerned access to and supply of goods and services. In one case, the

[156] NIHR 2016-83. Another similar example concerned a complaint from a man from Sudan who claimed he was refused a job because of his Sudanese origin, see NIHR 2016-60.

[157] Article 2(1) Aliens Employment Act (*Wet arbeid vreemdelingen*), *Staatsblad* 1994, 959, entered into force 1 September 1995.

[158] Article 10(1) Aliens Act 2000 (*Vreemdelingenwet 2000*), *Staatsblad* 2000, 495, entered into force 1 April 2001. The second paragraph contains some exceptions concerning, inter alia, emergency healthcare and legal assistance.

[159] Tweede Kamer, 1991-1992, 22 014, no. 5, p. 87-88. In addition, the new definition of a distinction in the GETA refers to 'where one person is treated less… etc.'

[160] See e.g. ETC 1996-110, 1998-31 and 1998-45. In addition, there is a possibility for associations to act on behalf of victims of discrimination when this is a (statutory) goal of their organisation.

then ETC allowed a company to submit a complaint against a customer.[161] Nevertheless, it is commonly held that legal persons (e.g. an association, foundation, institution or enterprise, etc.) do not fall under the personal scope (in the sense of being rights holders).

b) Liability for discrimination

In the Netherlands the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination (GETA, ADA and DDA, Article 1). This means that both natural and legal persons can be held accountable.

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

In the Netherlands, the personal scope of anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination (GETA, ADA and DDA, Article 1). The GETA does not apply to legal relationships within religious communities or to religious functions (Article 3 GETA).

b) Liability for discrimination

The personal scope of anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of liability for discrimination (GETA, ADA and DDA, Article 1). The GETA does not apply to legal relationships within religious communities or to religious functions (Article 3 GETA).

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In the Netherlands, national legislation applies to all sectors of public and private employment, self-employment and occupation, including contract work, self-employment, military service and holding statutory office, for the five grounds (see Articles 5(1) and 6 GETA, 3 and 4 ADA and 4 and 5 DDA). The exception to this rule is *holding statutory office* in the public administration sector. In the latter case, if the discriminatory treatment consists of a so-called 'unitary legislative act', the person or organisation who issues such acts cannot be held accountable for it under the equal treatment legislation. This is the case, for example, when a civil servant, on behalf of a local council, refuses to grant someone a permit or a subsidy.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In the Netherlands, national legislation prohibits discrimination in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds and in both the public and private sectors, as described in the directives.

[161] ETC 2003-142. This concerned a company whose employee had been discriminated against by another company. The ETC decided that this situation was covered under the prohibition of discrimination in the area of goods and services and that, in the case at issue, the defendant had indeed discriminated against the complainant's employee. See also the contribution by Peter Rodrigues in: de Wolff, D. (ed) (2004) *Gelijke behandeling, oordelen en commentaar 2003* ('ETC Opinions 2003'), Deventer, Kluwer.

The public sector is dealt with in the same way as the private sector. Article 5(1) of the GETA prohibits unlawful distinctions in the context of employment. No unlawful distinctions shall be made with regard to the following areas:

a. public advertising of employment and procedures leading to the filling of vacancies;
b. the employment of a worker via an employment agency or job placement (inserted by the EC Implementation Act);
c. the commencement or termination of an employment relationship;
d. the appointment and dismissal of civil servants;
e. terms and conditions of employment;
f. permission for staff to receive education or training during or prior to the employment relationship;
g. promotions;
h. working conditions (inserted by the EC Implementation Act).

The ADA and DDA have counterpart provisions in Articles 3 and 4 respectively. These articles reflect exactly the same material scope, although sometimes the sequence of subsections differs. Both public and private sector labour relations are covered. The central norm applies to the entire employment process, i.e. from the moment of notice being published of a vacancy, to the commencement of the employment relationship or public appointment and until its termination.[162]

In the GETA, self-employment is covered by Article 6. This Article provides that, 'it shall be unlawful to make distinctions with regard to the conditions for and access to the liberal professions and with regard to pursuing the liberal professions or for development within them'. For identical provisions, see also Article 4 ADA and Article 5 DDA. It is to be noted that the term 'self-employment' is not used in the articles mentioned, which instead speak of the 'liberal professions'. The term 'liberal profession' ('free occupation') may be slightly narrower than 'self-employment' (the term used in the directives). However, the problem can easily be circumvented by interpreting the term 'liberal profession' in a broad way in order to guarantee that not only doctors, architects etc. are covered, but also freelancers, sole traders, entrepreneurs, etc. This may seem odd to some readers, since in English the term 'liberal profession' is interpreted more narrowly than self-employment and could not easily be approximated. However, in the context of Dutch equality legislation, the use of 'liberal profession' has not led to problems. Discrimination is thus also prohibited in any working relationships where a relationship of authority between the employer and employee is absent.

A note on access to employment for disabled people: a major barrier may be that disabled or chronically ill people are asked questions about their physical or intellectual condition during the selection procedure and that their answers lead to a decision not to appoint them. In 2012 the law was amended in order to make the regulations in this regard stricter and to create a possibility for a complaints' procedure at the national level.[163]

In 2019 the Minister of Social Affairs and Employment presented a legislative proposal to oblige employers and intermediary agencies to develop policies for non-discriminatory recruitment and selection procedures. This obligation will be subject to enforcement by the labour inspection agency (*Inspectie SZW*).[164] The NIHR reviewed the proposal positively but observed that further specification was required.[165]

---

[162] See the Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 34. The same applies in the context of the ADA and the GETA.
[163] Medical Examinations Act (*Wet aanscherping medische keuringen*) *Staatsblad 2012*, 146.
[164] *Wetsvoorstel toezicht discriminatievrije werving en selectie* (Legislative proposal on supervision of non-discriminatory recruitment and selection), the proposal was published online for consultation on 7 October 2019, see: https://www.internetconsultatie.nl/wet_toezicht_discriminatievrije_werving_en_selectie.
[165] https://mensenrechten.nl/nl/publicatie/5dc041f1b55daa48dd78bd53.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In the Netherlands, national legislation prohibits discrimination in working conditions including pay and dismissals, for all five grounds and for both public and private employment (see Article 5(1) c, d, e and h GETA; Article 4 b, c, e and h DDA; Article 3 c, d, e and h ADA).

3.2.4 Access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

In the Netherlands, national legislation prohibits discrimination in vocational training outside the employment relationship, such as that provided by technical schools or universities, or adult lifelong learning courses.

In the first place, under all three laws (GETA, ADA and DDA) there is a prohibition against making a distinction with respect to giving permission for staff to receive education or training during or prior to the employment relationship (Article 5(1) sub f GETA, Article 3 sub f DDA and Article 4 sub f ADA.)

The prohibition against making a distinction in the areas of vocational training and professional guidance is laid down in Article 5 of the ADA and in Article 6 of the DDA. Both articles are identical. Subsection (a) lays down the prohibition of distinctions with regard to vocational guidance (*loopbaanoriëntatie en beroepskeuzevoorlichting*). Subsection (b) renders the central norm applicable to education aimed at entry to and functioning in the labour market (*onderwijs gericht op toetreding tot en functioneren op de arbeidsmarkt*). Subsection (b) covers education and training which form the final stage prior to entering the labour market, including retraining and further training courses.[166]

In practice, this covers practical education (*praktijkonderwijs*, which forms part of 'secondary education'); technical and vocational training for 16-18-year-olds (*middelbaar beroepsonderwijs*); technical and vocational training for those aged 18+ (*hoger beroepsonderwijs*) and university education. 'Adult lifelong learning courses' are not mentioned specifically but are covered by Article 5 of the DDA as well.

Subsections (a) and (b) of Articles 5 and 6 of the ADA and DDA are not aimed at a specific group. This norm therefore covers 'everyone' working within these institutions. With regard to subsection (b), this is aimed at 'state education, private / denominational education and education that is not publicly funded'.[167] Subsection (b) covers a wider range of education and training than Article 3(1)(b) of the Employment Framework Directive.

The directive only prohibits discrimination at the stage of 'entry to' vocational training. Dutch legislation covers the entire path from registration until the termination of the education or training.[168] In the GETA, Article 7 renders the prohibition against making a distinction applicable to (in brief): the supply of or access to goods or services which also embraces all forms of education;[169] the provision of vocational orientation and guidance; and advice or information regarding the choice of an educational institution or career.

It is furthermore specified in Article 7 that the Act applies to the above-mentioned areas if the alleged discriminatory acts are committed:

---

[166] Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 38.
[167] Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 37.
[168] Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, pp. 37-38.
[169] The material scope of the GETA covers the entire field of education. It thus offers wider protection than the directives.

a. in the course of carrying on a business or exercising a profession;
b. by a public service;
c. by institutions which are active in the field of housing, social services, healthcare, cultural affairs or education; or
d. by private persons not engaged in carrying on a business or exercising a profession in so far as the offer is made publicly.

This covers what is mentioned in Article 3(1)(b) of the directives; beyond that, general primary and secondary education are also covered by this provision.

It should be emphasised that the material scope regarding goods, services and the entire education field as laid down in Article 7 of the GETA applies to all grounds that are covered by the Act. In this regard Dutch law goes far beyond the requirements of Directive 2000/78/EC. Of course, this is not to say that the reality on the ground always reflects the legal non-discrimination standards. Several studies show that ethnic minority students, in particular, face discrimination in finding internships to help prepare them for the labour market.[170] In 2018 the Ministry of Education launched a policy initiative to promote equal internship opportunities, including by raising awareness of (unconscious) bias amongst employers and educational institutions and by lowering the threshold for students to signal discrimination experienced.[171]

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In the Netherlands, national legislation prohibits discrimination in relation to membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both public and private employment. Article 6a of the GETA provides the following:

> 'It shall be unlawful to make distinctions with regard to the membership of or involvement in an employers' organisation or trade union, or a professional occupational organisation, as well as with regard to the benefits which arise from that membership or involvement.'

Article 5a of the DDA and Article 6 of the ADA are identical to this provision.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In the Netherlands, national legislation prohibits discrimination in social protection, including social security and healthcare as formulated in the Racial Equality Directive (Article 7a(1) GETA). This extension to social protection is restricted to racial discrimination. The other grounds can only rely on the more general, constitutional and international prohibitions of discrimination.[172]

a) Article 3(3) exception (Directive 2000/78)

Dutch law does not rely on the Article 3.3 exception. As mentioned, under Article 7a of the GETA, the extension to social protection is restricted to racial discrimination. The other

[170] E.g. ROA, *Mbo stages en de migratieachtergond van studenten* (Mbo internships and student's migration background), 2018/17; KIS, *Gelijke kansen op gelijke stages. Een vervolgonderzoek naar stagediscriminatie* (Equal opportunities for equal internships. A follow-up study of discrimination in internships), 2018.
[171] Tweede Kamer 2019-2020, 31 524, no. 443.
[172] See, for example, District Court of Amsterdam, 1 November 2018, ECLI:NL:RBAMS:2018:7835 (age discrimination, social assistance – no violation) and Central Appeals Tribunal (*Centrale Raad van Beroep*) 9 July 2019, ECLI:NL:CRVB:2019:2263 (age discrimination in relation to income supplement – no violation).

grounds are only protected by the constitutional and international prohibitions of discrimination in the areas of social life mentioned above. The issue of the scope of the protection against discrimination in the area of social security and social benefits arises regularly in discussions about the possibilities for local social assistance and social benefits offices to cut benefits or even refuse benefits for citizens who, as a consequence of certain behaviour (for example, a refusal to shake hands with a person of the opposite sex) or wearing specific religiously required dress (e.g. a burqa or a headscarf), do not succeed in their obligation to find paid work.[173]

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

In the Netherlands, national legislation prohibits discrimination in social advantages as formulated in the Racial Equality Directive (Article 7a GETA). This explicit provision on social advantages is restricted to racial discrimination, but here again the other grounds can also rely on the more general, constitutional and international prohibitions of discrimination.[174] In addition, protection against discrimination may be available under the GETA and DDA where social advantages overlap with providing goods and services in areas covered by these acts.

This ties in with the Government's view that the notion of 'social advantages' refers to advantages of an economic and cultural nature which may be granted by both public and private entities. These may include student grants, public transport reductions and reductions for cultural or other events. Advantages offered by private entities are, for example, reductions to entry prices for cinemas and theatres for certain categories of visitors.[175] Discrimination in relation to social housing is covered by Article 7 GETA for all the grounds covered by the act, including ethnic and racial discrimination.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

In the Netherlands, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive. The GETA is integrally applicable to all aspects of education, including all types of schools. This provision applies to 'race' and 'ethnic origin' but also to 'religion/belief' and 'sexual orientation' (as well as to all other grounds covered by the GETA).[176] In this regard, Dutch law goes beyond the requirements set by the directive.[177] Vocational training given before or during the employment relationship is regulated by Article 5(1) sub f of the GETA. The scope of the DDA was already extended to general primary and secondary education in August 2009,[178] but since June 2016 it has covered the entire field of education.[179]

---

[173] The Central Appeals Tribunal has held that a person receiving a social, minimum subsistence benefit can be required to refrain from wearing a niqab to enhance her chances of finding paid work, see *Centrale Raad van Beroep* 9 May 2017, ECLI:NL:CRVB:2017:1639. https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CRVB:2017:1639.

[174] See, for example, Court of Appeal of The Hague, 25 September 2019, ECLI:NL:GHDHA:2019:2541 (tax advantages and age discrimination).

[175] Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 15.

[176] It should be reiterated that the material scope regarding goods, services and the entire education field as laid down in Article 7 of the GETA applies to all grounds that are covered by the Act. In this regard Dutch law goes far beyond the requirements of Directive 2000/78/EC.

[177] See also Memorandum concerning the Implementation of Directive 2000/78/EC and Directive 2000/43/EC (*Notitie over de Implementatie van Richtlijn 2000/78/EG en Richtlijn 2000/43/EG*), Tweede Kamer, 2001-2002, 28 187, no. 1, pp. 10-11.

[178] Amendment to the Disability Discrimination Act concerning the extension to primary and secondary education and housing (*Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen*), *Staatsblad 2009-101*, Wet van 19 jan. 2009. See Articles 5b (education) and 6a, 6b and 6c (housing).

[179] Act to implement the Convention on the Rights of Persons with Disabilities (*Wet van 14 april 2016 tot uitvoering van het op 13 december 2006 te New York tot stand gekomen Verdrag inzake de rechten van personen met een handicap (Trb. 2007, 169)*, *Staatsblad* 2016-215).

One problem that has been dealt with in the framework of equal treatment legislation is the fact that many school boards (or local authorities in charge of state-funded schools) have designed or are in the process of designing regulations to increase the distribution of children from different cultural backgrounds across schools, in order to avoid the development of 'black schools' (i.e. schools with a great majority of pupils of immigrant origin). There has been some discussion in the Netherlands about whether local government has the right to 'disperse' people of non-Dutch descent or people with low incomes as far as housing and schools are concerned, in order to prevent 'black neighbourhoods' or 'black schools' from emerging. In relation to housing, the then ETC strongly advised against such policies.[180] The policy of a local authority to disperse pupils of different origins across various state-funded schools was also deemed to be directly discriminatory on the ground of ethnic origin.[181] In the past there has been some academic debate about the question of whether equal treatment legislation is unduly restrictive with regard to the possibilities for local government to develop such policies.[182]

a) Pupils with disabilities

In the Netherlands, the general approach to education for pupils with disabilities does not give rise to problems. Several provisions are made with regard to people with disabilities in the field of education (Article 5b(1)(c) in conjunction with Article 2 DDA).

Mainstream secondary education (*voortgezet onderwijs*), as well as general primary education, has been covered under the DDA since August 2009. The institutions that are covered are not only those which are recognised or subsidised by the Ministry of Education, but also those which are not recognised or subsidised by the Ministry or whose regulation is left to the market.[183]

The issue of the accessibility of (school) buildings has already been addressed above (Section 2.6 et seq.). In addition, people with disabilities have certain rights to accommodation of the education itself. Parents can request accommodations for their children with disabilities. Another example is the right to have adaptations made to state exams, such as large-print exam papers or an extension of the time allowed for an exam, in order to meet the needs of students with dyslexia or other disabilities.[184] There are several forms of special primary education for pupils with certain cognitive impairments in the Netherlands. However, these schools are only accessible for pupils in cases of absolute necessity. A primary aim of the Dutch school system remains to educate as many pupils as possible in mainstream schools.

In 2014 a new law on special education for pupils and students with intellectual and physical disabilities, the Act on Tailored Education (*Wet Passend Onderwijs*), entered into force.[185] This new act changed the way in which schools are compensated for the costs

[180] See ETC Advice 2005/03.

[181] ETC 2005-25. The ETC came to this conclusion as the pupils subjected to the policy consisted *de facto* exclusively of pupils of non-Dutch origin.

[182] See, e.g. Bovens, M. and Trappenburg, M., 'Segregatie door Anti-Discriminatie' ('Segregation through Anti-Discrimination'), in: Holtmaat, R. (2004), *Gelijkheid en (andere) grondrechten* ('Equality and (other) fundamental rights'), Deventer, Kluwer, pp. 171-186. See also the report by the Council for Public Administration (*Raad voor openbaar bestuur*) (2006) *Verschil moet er zijn; bestuur tussen discriminatie en differentiatie'* ('There must be difference; administration between discrimination and differentiation'), The Hague.

[183] Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 38.

[184] In 2012, a case was brought before the then ETC (2012-85) about maths charts, needed by a pupil with dyscalculia. She requested permission to use a maths chart during her final exam, which was refused on the ground that the regulations had prohibited this since 2009. However, the ETC rightfully pointed to the ranking of the legislation at issue and stated that, the prohibition notwithstanding, the school should still have offered the pupil a reasonable accommodation. It thereby complements the general directions, given in an earlier Opinion, about what schools need to do in order to fulfil their obligation to provide reasonable accommodation for pupils with (learning) disabilities (for example, ETC 2011-75, para 3.15).

[185] Act of 11 October 2012 concerning the amendment of several acts regarding education (*Wet van 11 oktober 2012 tot wijziging van enkele onderwijswetten in verband met een herziening van de organisatie en*

associated with teaching students with learning disabilities and includes severe austerity measures. Financing was moved from individual schools to groups of schools and the total budget available for schools that are solely open to students with learning disabilities was reduced, inevitably leading to more intellectually and physically disabled pupils applying for admission to mainstream schools. In 2015, the Ombudsman for Children (*Kinderombudsman*) published a report in which the new law was severely criticised.[186] Since then a large-scale evaluation project was initiated to closely monitor developments and new policy initiatives.[187] Throughout 2019 a policy aim has also been to improve the connection between education and healthcare for pupils with disabilities, to ensure adequate care arrangements within schools as well as education-oriented care for children unable to attend school.[188]

b) Trends and patterns regarding Roma pupils

In the Netherlands, there are no specific patterns existing in education regarding Roma pupils, such as segregation. Therefore, in this respect it does not seem to be necessary to put into effect legal instruments with regard to Roma and Traveller children. In the field of education, only one case of alleged discrimination regarding Roma is known. In this case, the board of an association of 14 (Christian) primary schools used a quota of 15 % per institution for pupils who speak the Dutch language as a second language, in order to combat segregation (the measure was not explicitly targeting Roma and Travellers, but also children with a migration background). This admissions policy was deemed to be unlawful indirect distinction against Roma and Sinti communities, on the ground of race/ethnic origin.[189]

This is not to say that Roma do not face considerable difficulties regarding education. According to a report from 2018, their situation is generally evaluated as poor, although substantial differences exist between municipalities as well as within Roma communities.[190] While the participation rate in primary education is reasonably good, secondary education reveals a different picture. In addition, the level of secondary education is much lower for Roma than the population in general. Many municipalities are devoting a great deal of energy and effort to improving this situation, in cooperation with Roma communities, but progress is slow.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

In the Netherlands, national legislation prohibits discrimination in access to and the supply of goods and services as formulated in the Racial Equality Directive. This is covered by Article 7 of the GETA. Subsection 1 of Article 7 provides as follows:

> 'It is unlawful to make a distinction in offering goods or services, in concluding, implementing or terminating agreements thereon, and in providing educational or career guidance if such acts of making a distinction are committed:

---

financiering van de ondersteuning van leerlingen in het basisonderwijs, speciaal en voortgezet speciaal onderwijs, voortgezet onderwijs en beroepsonderwijs), *Staatsblad 2012*, 533.

186 The report is available at: www.dekinderombudsman.nl/ul/cms/fck-uploaded/2015.KOM014.Werktpassendonderwijs.rapport.pdf.

187 *Dertiende voortgangsrapportage passend onderwijs* (Thirteenth progress report on tailored education), Tweede Kamer 2018-2019, 31 497, no. 310; *Derde meting monitor Passend Onderwijs in het mbo* (Third monitor on tailored education in vocational education), published as Annex to Tweede Kamer 2018-2019, 31 497, no. 331.

188 Tweede Kamer 2019-2020, 31 497 and 31 839, no. 334.

189 See ETC 2003-105.

190 *Monitor Sociale Inclusie: meting 3. Tweede vervolgmeting naar de woon- en leefomstandigheden van Roma en Sinti in Nederland* (Social inclusion monitor: measurement 3. Second follow-up measurement of the housing and living situation of Roma and Sinti in the Netherlands), 2018: www.rijksoverheid.nl/documenten/publicaties/2018/11/16/monitor-sociale-inclusie-meting-3

a. in the course of carrying on a business or practising a profession;
b. by the public sector;
c. by institutions which are active in the fields of housing, social services or welfare, healthcare, cultural affairs or education; or
d. by private persons not engaged in carrying on a business or practising a profession, insofar as the offer is made publicly.'

This is applicable to all grounds covered by the GETA and, since June 2016, also to disability under the DDA (Article 5b(1)). In this regard, Dutch law extends beyond the directives' requirements. Unilateral governmental decisions and acts (e.g. a decision not to grant a subsidy) do not fall under the scope of Article 7.[191]

a) Distinction between goods and services available publicly or privately

In the Netherlands, national law distinguishes between goods and services available to the public (e.g. in shops, restaurants or banks) and those only available privately (e.g. limited to members of a private association). From Article 7 (subsection d), it is clear that the distinction between goods and services that are available privately and those that are available publicly is of importance only insofar as supply by private individuals is concerned. It follows from parliamentary precedent (and from case law) that this similarly applies to private associations. The latter is the result of the balancing of interests of the Constitutional right to freedom of association and the right to equal treatment.

It should be noted that the area of access to goods and services in general is not covered by the ADA.

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

In the Netherlands, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive. Housing is covered under Article 7(1) GETA and also under Article 5b(1) and Articles 6a-c DDA. Thus it covers all grounds except age. The duty to make reasonable accommodations in relation to housing only exists in the case of disability discrimination. However, this provision is not applicable in as far as the adaptations would require building or reconstruction work in or around a house (on the basis of Article 6c of the DDA).

The prohibition of discrimination applies to all aspects of housing. No specific exceptions apply as regards housing other than those which will be dealt with below. The Rotterdam Act (*Rotterdamwet*),[192] which grants local authorities the right to refuse to let subsidised houses in certain areas to people or households with a low income or without stable employment and to refer them to other areas, in order to avoid the emergence of 'ghettos', has now been in place for a couple of years and has not been found discriminatory.[193] The current minister responsible for housing plans to give municipalities even more scope to set strict requirements.[194] A complaint regarding this type of policy was brought to the European Court of Human Rights. The Grand Chamber ruling held that the policy did not violate the ECHR.[195]

Generally speaking, migrants have a right to equal treatment with regard to public (social) and private housing, but realities on the ground are quite different. The prevalence of discrimination against people with a migration background regarding housing was brought

[191] NB: Article 7a, which concerns social security and social services, does include unilateral actions by government or government agencies.
[192] Tweede Kamer, 2004-2005, 30 091. Law of 20 December 2005, *Staatsblad 2005*, 726.
[193] Although the ETC (now the NIHR) thought that it could amount to indirect discrimination on grounds of race as people of non-Dutch or more generally non-western origin would be particularly affected. See Advice 2005/03.
[194] Tweede Kamer, 2013-2014, 30 798.
[195] ECtHR (Grand Chamber) 6 November 2017, *Garib v. The Netherlands* (application no. 43494/09).

to light by situation testing initiated by journalists. They approached 50 estate agents to act on their behalf to rent out accommodation they pretended to have available. They also indicated they would prefer not to rent it to people with a migration background (*allochtonen*). 46 out of the 50 went along with this condition.[196] The NIHR regards this type of discrimination as discrimination on grounds of race.[197] In November 2019 the minister responsible for housing set out a list of policy measures that are being taken to combat discrimination in housing. These include awareness raising, including through training for real estate agents, the use of mystery shoppers and situation testing, and increasing awareness of the possibilities to signal discrimination.[198]

a) Trends and patterns regarding housing segregation for Roma

In the Netherlands, there are patterns of housing segregation against the Roma. Roma and Traveller people tend to live in caravans or trailers which are situated in officially designated 'trailer parks' (*woonwagenkampen*). The lack of systematic data in this respect makes it difficult to give exact numbers on the housing situation of Roma and Travellers, but it has been observed that a shortage of caravan sites makes it impossible for family members to live in the same encampment, something of paramount importance to Roma and Sinti.[199] In failing to provide enough caravan sites, the Government makes it impossible for Roma and Sinti to sustain their cultural identity. Several opinions from the NIHR emphasise the importance of providing sufficient caravan sites. The NIHR found that a policy implemented by a local authority that would eventually put an end to 'trailer parks' (a so called 'extinction policy') amounted to discrimination on the ground of race (ethnic identity).[200] This position has been confirmed in more recent cases.[201] According to the NIHR, municipalities should include attention to the specific needs of this category of residents in their housing policies.[202]

In a report published in 2017 the National Ombudsman also concluded that many municipal authorities discriminate against these groups in their housing policies by not making available sufficient caravan or trailer sites. According to the Ombudsman, instead of treating them the same as other people looking for housing, the principle of equality requires municipal governments to treat them differently in order to respect their cultural identity and accommodate the specific housing needs associated with this identity. The Ombudsman urged the Government to take the human rights framework for Roma into account as developed in, among others, the jurisprudence of the European Court of Human Rights and the NIHR and made several recommendations to both the national and local governments to develop non-discriminatory housing policies that will cater to the needs of Roma, Sinti and Travellers by making available sufficient trailer locations.[203]

---

196 'Onderzoek discriminatie woningmarkt. Rachid is ook gewoon een nette jongen' ('Investigation of discrimination in the housing market. Rachid is just an ordinary, decent man'), *Groene Amsterdammer* 28 March 2018: www.groene.nl/artikel/rachid-is-ook-gewoon-een-nette-jongen.

197 See e.g. NIHR Opinion 2018-54.

198 Tweede Kamer 2019-2020, 32 847, no. 577.

199 Van Donselaar, J. and Rodrigues, P. (eds.) (2006), *Monitor racisme and extremisme. Zevende rapportage* (Racism and extremism monitor. Seventh report), Amsterdam, Anne Frank Stichting/Leiden, Leiden University, available at: https://annefrank.global.ssl.fastly.net/media/imagevault/3rrlCvDxsnCqeCO5EuGR.pdf. Similar concerns are presented in the Social Inclusion Monitor of 2018, which also indicates that many differences also exist between Roma. *Monitor Sociale Inclusie: meting 3. Tweede vervolgmeting naar de woon- en leefomstandigheden van Roma en Sinti in Nederland* (Social inclusion monitor: measurement 3. Second follow-up measurement of the housing and living situation of Roma and Sinti in the Netherlands), 2018: www.rijksoverheid.nl/documenten/publicaties/2018/11/16/monitor-sociale-inclusie-meting-3.

200 NIHR 2014-165, 2014-166 and 2014-167.

201 NIHR 2015-6, 2016-19, 2016-22, 2016-71, 2016-72; 2017-55; 2017-103; 2017-136; 2017-137.

202 NIHR 2016-19.

203 *Woonwagenbewoner zoekt standplaats. Een onderzoek naar de betrouwbaarheid van de overheid voor woonwagenbewoners* (Trailer resident seeks trailer site. An investigation into the reliability of the public authorities for trailer inhabitants): www.nationaleombudsman.nl/system/files/bijlage/DEF%20Rapport%202017060%20Woonwagenbewoner%20zoekt%20standplaats.pdf.

These concerted efforts, in conjunction with strong EU involvement with the situation of Roma, seem to have been successful. In 2018 the Minister of the Interior and Kingdom Relations issued a new housing policy framework for Roma, Sinti and Travellers.[204] The framework is directed at preventing discrimination against Roma, ensuring their cultural rights and providing legal security in the area of housing. It provides guidelines for municipal authorities, which are in charge of housing policies at the local level. More specifically the policy framework requires municipalities to give Roma more space to live according to their own cultural identity and to ensure they have the opportunity to acquire a place to live on a trailer park within a reasonable timeframe. Most importantly, municipalities are no longer allowed to pursue an 'extinction policy'.

[204] *Beleidskader Gemeentelijk woonwagen- en standplaatsenbeleid* (Policy framework for municipal trailer and campsite policy): www.rijksoverheid.nl/documenten/rapporten/2018/07/02/beleidskader-gemeentelijk-woonwagen-en-standplaatsenbeleid.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In the Netherlands, national legislation provides for an exception for genuine and determining occupational requirements.

Race, sex. In the GETA, the exception for genuine occupational requirements ('GOR exception') only exists for the grounds of *race* and *sex.* As far as race is concerned, this has been laid down in Article 2(4) of the GETA:

> 'The prohibition of making distinctions on the grounds of race as it is contained in this Act, shall not apply:
>
> a. in cases where a person's racial appearance is a determining factor, provided that the aim is legitimate and the requirement is proportionate to that aim;
> b. if the distinction concerns a person's [outward] racial appearance and constitutes, by reason of the nature of the particular occupational activity concerned, or of the context in which it is carried out, a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate to that objective.'[205]

In contrast to Article 4 of Directive 2000/43/EC, which speaks of a characteristic related to racial or ethnic origin, the Dutch provision specifies that only outward racial appearances may constitute a genuine occupational requirement.[206] This means that 'race' as such is not regarded as a permissible ground for a particular distinction.[207] Only physical differences (skin colour, hair type, etc.) may form the basis for a distinction, to the exclusion of sociological differences. The GETA does not, for example, allow a care institution, which looks after the well-being of young offenders of Moroccan origin, to express in a job advertisement a preference for a social worker of Moroccan origin.[208] On the basis of Article 4(6) GETA, these exceptions have been set out in a Governmental Decree of 1994.[209] The Decree exhaustively indicates to which professional activities the Article 2(4) exceptions apply. These are:

a. The profession or activity of actor, dancer or artist insofar as the profession or activity relates to the performance of a certain role (elaboration of subsection b);
b. Mannequins, models for photographers, artists, etc., insofar as requirements can reasonably be imposed on outward appearances (elaboration of subsection b).

Religion, belief, sexual orientation. Although Article 4(1) of Directive 2000/78/EC would have allowed for it, no GOR exception has been enshrined in the GETA for these grounds. However, in the context of the exceptions of Article 5(2) of the GETA, institutions founded on religious principles, or on political principles, or schools founded on the basis of a religious denomination may impose requirements in relation to the occupancy of a post which, in view of the organisation's purpose, are necessary to uphold its founding principles. However, the Article 5(2) GETA exceptions were not rationalised by the idea of 'genuine occupational requirements'. They were regarded as necessary in order to reconcile

---

[205] Subsection b was inserted by the EC Implementation Act. With this amendment the government intended to follow the wording of the directive more closely. See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 10. However, prior to implementation the 'genuine occupational requirement exception' was also covered by the more general wording of subsection a of Article 2(4).

[206] Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 10.

[207] Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* (Equal treatment legislation), Deventer, Kluwer, p. 129.

[208] See ETC 1997-51.

[209] Governmental Decree on Equal Treatment (*Besluit Gelijke Behandeling*), *Staatsblad 1994*, 657, last amended in 2012: *Staatsblad 2012*, 565.

the constitutional right to equality with other constitutional rights, namely the freedom of religion and the freedom of education, as well as the freedom of political opinion. Although the rationalisation is different, in practice this exception is compatible with Article 4(1) of the Employment Framework Directive. The requirements that are set on this ground need to be closely linked to the nature and content of the job in this particular context (of an institution of a specific religious denomination).[210] This means that only functions that are related to the 'mission' of the organisation can be exempted from the equal treatment norm (i.e. the exception is not applicable when it concerns a gardener for a church). It is also a requirement that the organisation applies a consistent policy in this respect.[211] For further details see also below under Section 4.2.

Disability. The GOR exception was not included in the DDA. In the Government's view, in contrast to 'race' and 'sex', no scenario is imaginable in which 'disability' would constitute a genuine occupational requirement.[212] An amendment submitted by a Member of Parliament in this respect was rejected.[213]

Age. Since the ADA does not differentiate between 'direct' and 'indirect' distinction, an 'objective justification' is possible for both types (see Article 7(1)(c) ADA), and the Government considered it not to be necessary to include the GOR exception. In this view, in cases in which 'age' is considered a genuine occupational requirement, this can be assessed via the objective justification test.[214]

Conceptually speaking, this is open to criticism. In this view, the Article 4(1) exception of the directive is regarded as a species of the Article 6 exception of the directive.[215] In that light it would have been preferable, had the Government explicitly included the GOR exception.

4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

In the Netherlands, national law provides for an exception for employers with an ethos based on religion or belief, in Article 5(2) GETA. Employers with an ethos based on religion or belief can only rely on this exception in the case of an accusation of discrimination based on religion/belief and political conviction. Typical cases that have come to the NIHR and former ETC concern schools and other organisations based on a Christian denomination which require their personnel to adhere to the specific tenets of the denomination concerned and act accordingly. Article 5(2) GETA is interpreted strictly by the NIHR. An organisation has to show that its identity is indeed manifested in its actual practice and is consistently upheld. It must also show that the requirements are necessary to fulfil the specific function held by the employee in the organisation. Thus the Salvation Army may refuse to employ a man as a salary administrator for not adhering to the Christian religion as the job also includes external contacts and contacts with colleagues in which this is a functional requirement.[216]

Although formally not an exception to the prohibition of discrimination, one should be aware that the GETA does not apply to legal relationships within churches, other religious communities or associations of a spiritual nature and excludes the application of equal

[210] It may be useful to note that the exception thus does not apply to 'ordinary' private companies such as involved in the *Achbita* case, CJEU 14 March 2017, C-157/15 (*Achbita v. G4S*).
[211] These criteria were explained by the ETC in its Opinion 1996-118.
[212] Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 35.
[213] Amendement Terpstra, Tweede Kamer, 2001-2002, 28 169, no. 11. This amendment was rejected.
[214] Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 35.
[215] See Grapperhaus, F. B. J. (2002), 'Het verbod op onderscheid op grond van leeftijd in arbeid en beroep' ('The prohibition of discrimination on the ground of age in employment and occupation'), in *Ondernemingsrecht* (Company law), 2002-12, pp. 356-363, at p. 362.
[216] NIHR opinion 2015-68; for a sample of older cases see e.g. ETC 2000-67, 2003-145, 2005-102, 2006-218, 2006-93, 2012-68, 2013-36.

treatment norms to 'ministers of religion', as these are considered to be internal affairs. This means a restriction of the scope of application (see Article 3 GETA), for which the rationale lies in the constitutional right of freedom of religion and in the division between church and state.

Article 3 GETA:

> 'This Act does not apply to:
> a. legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature;
> b. the office of minister of religion.'

It should be noted that only purely internal affairs of religious organisations fall outside the scope of the GETA. Thus, for example, the employment relationship between a gardener and a religious community falls within the scope of the GETA. The more the legal relationship is disconnected from the rationales of freedom of religion and the division between church and state, the less likely it is to be considered a purely internal affair.[217]

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In the Netherlands, there are specific provisions or case law relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination in the context of employment. Specific provisions in this area are Articles 3 and 5(2) of the GETA, which have been discussed above.

In addition, in the Netherlands, the now abolished 'sole-ground construction' (*enkele feit-constructie*) included in Article 5(2*)* has played an important role with regard to the question of whether a Christian school may lawfully refuse to employ a cohabiting homosexual in a teaching position. While the 'sole ground' that a person is homosexual could not *per se* lead to the refusal to employ such a person or to dismiss them, the situation might be different if 'additional circumstances' were taken into account. This could be any 'behaviour' inside and/or outside the school from which it is apparent that the teacher does not subscribe to the particular religious belief or even contests this belief openly. The wording of Article 4(2) of Directive 2000/78/EC seemed not to permit that 'additional circumstances' play a material role *unless* such circumstances coincide with the organisation's religion or belief.

As a reaction to the European Commission's infringement procedure against the Netherlands, where this issue was mentioned by the Commission,[218] and after several bills and advice from various NGOs, the Council of State and the (former) equality body, the sole ground construction was finally abolished in 2015.[219] The new text of Article 5(2) GETA corresponds closely to the wording of the exception in Article 4(2) of Directive 2000/78/EC. In its opinion 2016-10 the NIHR applied the amended provision and held that the refusal of an employer to accept a person for an internship because they are homosexual constitutes direct discrimination for which no justification can be put forward under the GETA.[220]

---

[217] Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* (Equal treatment legislation), Deventer, Kluwer, p. 105.
[218] Letter dated 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement no. 2006/2444. Article 5(2) GETA was mentioned, however, in the end the Commission did not ask the government to change this provision.
[219] Tweede Kamer 2010-2011/2013-2014, 32 476, nos. 1-11.
[220] NIHR opinion 2016-10.

- Religious institutions affecting employment in state-funded entities

In the Netherlands, religious/spiritual institutions are permitted to select people on the basis of their religion/spiritual beliefs to be hired for or dismissed from a job in a state entity or in an entity financed by the state. Under Dutch law religious/spiritual institutions play a role in selecting people to fulfil religious/spiritual functions in state entities. This applies to teachers of religion in primary schools and to religious/spiritual counsellors (*geestelijke verzorgers*) in penitentiary institutions and in the military.

Education
Teachers of religion in primary schools are nominated by religious congregations, local churches or organisations with full legal competence and a statutory aim of providing religious education. Teachers of ethics (*levensbeschouwelijk vormingsonderwijs*) must be nominated by belief-based entities with full legal competence (*volledige rechtsbevoegdheid bezittende organisaties op geestelijke grondslag*).[221] The same applies to teachers of religion and ethics in schools for children with special needs[222] and in public secondary schools.[223]

Penitentiary institutions
The selection of religious/spiritual counsellors who work in penitentiary institutions is regulated in the Penitentiary Decree (*Penitentiaire maatregel*).[224] Article 25(1) of the Decree provides that the Ministry of Justice must employ representatives of the Protestant and Roman Catholic churches and the humanists in the functions of chief pastor, chief chaplain and chief humanist spiritual counsellor. The chief pastor, chief chaplain and chief humanist spiritual counsellor represent their respective nominating organisations (*zendende instanties*) and are charged with selecting counsellors to work in the penitentiary institutions (Article 25(2) Penitentiary Decree). Every institution must have counsellors of different spiritual persuasions, including at least Protestant, Roman Catholic and humanist counsellors (Article 24 Penitentiary Decree). Penitentiary institutions may hire counsellors belonging to other faiths, provided that the counsellors already working for the institution have been consulted (Article 27(1) Penitentiary Decree). Muslim, Hindu and Buddhist counsellors are hired 'in cooperation with religious organisations of the relevant faiths'.[225] Muslim, Hindu and Buddhist counsellors must have a degree in theology, but this requirement can be waived for Buddhist counsellors if the counsellor is nominated by the Dutch Buddhist Union.[226]

Military
The selection of religious/spiritual counsellors working in the military is regulated in the Ministerial decree on the appointment of religious/spiritual counsellors (*Regeling aanstelling geestelijk verzorgers*).[227] Before a counsellor is appointed in the military, the nominating organisation must state its approval in writing (Article 2(2) of the Decree). This approval may be subject to conditions; if the nominating organisation withdraws its approval it is considered that the counsellor no longer meets the requirements to be

[221] Article 51 Act on primary education (*Wet op het primair onderwijs*), *Staatsblad 1981*, 468.
[222] Article 54 Act on centres of expertise (*Wet op de expertisecentra*), *Staatsblad 1982*, 730.
[223] Articles 46 (1) and (5) and 47 (1) Act on secondary education (*Wet op het voortgezet onderwijs*), *Staatsblad* 1963, 40.
[224] Penitentiary Decree (*Penitentiaire* maatregel), *Staatsblad 1998*, 111, last amended by *Staatsblad 2019*, 506. For penitentiary psychiatric centres (*tbs-instellingen*), similar provisions are laid down in Articles 36-39 of the Rules on treatment in penitentiary psychiatric centres (*Reglement verpleging ter beschikking gestelden*), *Staatsblad 1997*, 217. For juvenile detention centres (*justitiële jeugdinrichtingen*), see Articles 51-54 of the Rules on juvenile detention centres (*Reglement justitiële jeugdinrichtingen*).
[225] Article 4 Ministerial decree on job requirements and remuneration of religious/spiritual counsellors from other religious/spiritual organisations (*Regeling functie-eisen en vergoeding geestelijk verzorgers overige stromingen*), *Staatscourant 2002*, 108. The Decree talks about 'different religious/spiritual organisations' (*organisaties van de verschillende gezindten*) instead of 'nominating organisations' (*zendende instanties*).
[226] Article 3(5) Ministerial decree on job requirements and remuneration of religious/spiritual counsellors from other religious/spiritual organisations.
[227] *Staatscourant 2017*, 55264.

appointed (Article 2(3) and (4) of the Decree). The Decree does not specify that any particular religious or spiritual organisations must be represented. At the time of writing this report, the Ministry of Defence stated that the counsellors it had represented Roman Catholics, Protestants, humanists, Jews, Hindus and Muslims.[228]

4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)

In the Netherlands, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination. Article 17 of the ADA enshrined an exception (which was of a temporary kind): until 1 January 2008, the ADA did not apply to military service. There have never been any limitations to the scope of the DDA and the GETA concerning the armed forces.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In the Netherlands, national law does not include exceptions relating to difference of treatment based on nationality. Article 1 of the Constitution provides that, 'all persons in the Netherlands shall be treated equally in equal circumstances'. Protection against discrimination offered by Article 1 of the Constitution, by criminal law, by civil law and under the specific statutory equal treatment acts is not tied to any nationality requirement.

In the Netherlands nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law. Besides discrimination on the ground of race, the GETA also prohibits nationality discrimination. Thus, the Dutch General Equal Treatment Act goes beyond the requirements stemming from Directive 2000/43/EC. Distinction on the grounds of nationality is, in principle, prohibited as follows from Article 1. However, Article 2(5) enshrines some exceptions: the prohibition on the grounds of nationality shall not apply if the distinction is based upon *generally binding rules* (i.e. Statutory Acts and Acts by the administration such as governmental decrees) or on *written or unwritten rules of international law*.[229] Moreover, the prohibition shall not apply in such cases where 'nationality' is a determining factor (e.g. nationality requirements imposed upon players for the national football team).[230] Nationality discrimination does include stateless status.

b) Relationship between nationality and 'race or ethnic origin'

In the GETA nationality and race/ethnicity are mentioned as separate discrimination grounds. However, in practice different treatment on the ground of nationality may often result in indirect discrimination on the ground of race/ethnicity. The legislative history of the GETA shows that the ground of nationality was included at the instigation of civil society organisations, notably the National Bureau for the Elimination of Racism (*Landelijk Bureau Racismebestrijding*), to ensure that nationality-based distinctions could not be used as a guise for racial discrimination.[231] Yet it was also considered that in some contexts distinctions based on nationality are legitimate. Therefore, in respect of nationality discrimination, more 'exceptions' (or justifications) are allowed, especially when the differential treatment is related to issues concerning immigration and nationality legislation. In cases where indirect discrimination on the ground of race/ethnicity is suspected, the regular objective justification test applies.

---

[228] Website of the Ministry of Defence, http://www.defensie.nl/onderwerpen/personeelszorg/geestelijke-verzorging.
[229] See e.g. ETC 1997-13, 1998-81 and 2002-61.
[230] See e.g. ETC 1996-77.
[231] Notably Tweede Kamer 1990/1991, 22 014, no. 4 and Tweede Kamer 1992/1993, 22 014, no. 36.

There is an overlap between nationality and race/ethnicity in the context of indirect discrimination. Sometimes, a case of direct nationality discrimination can be qualified as a case of indirect racial discrimination. Because both grounds of discrimination are covered in the GETA, this does not cause great difficulties in the case law insofar as the areas that are covered by the non-discrimination principle (material scope) are the same. However, for race/ethnicity, the scope of the prohibition of discrimination is wider, also including social protection (Article 7a GETA.) When a complaint concerns social protection, including *inter alia* social security rights, the NIHR is inclined to interpret the concept of race/ethnicity in a wide sense, including situations that at first glance clearly refer to nationality as the ground for making a distinction. The NIHR seems to equate the concepts of national origin and ethnic origin and also equates ethnic origin and race.[232]

4.5 Health and safety (Article 7(2) Directive 2000/78)

Exceptions in relation to disability and health/safety

In the Netherlands there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC). The DDA contains a provision that mirrors Article 7(2) of the directive.[233]

Article 3(1)(b) of the DDA provides:

> 'The prohibition of making a distinction shall not apply if:
> (…)
> a) the distinction relates to a regulation, standard or practice which is aimed at creating or maintaining specific provisions and facilities for the benefit of persons with a disability or chronic illness.'

Apart from this, there is also Article 3(1)(a) of the DDA:

> 'The prohibition from making a distinction shall not apply if:
> a) the distinction is necessary for the protection of public security and health (…).'

It is sometimes stated that this latter provision also represents the implementation of Article 7(2) of the directive (only applicable to disability). The author of this report holds that it is the implementation of (the more generally applicable) Article 2(5) of the directive and therefore also deals with this particular provision in Section 4.8 below.

The exception made by Article 3 (1)(a) of the DDA must be interpreted narrowly. It follows from parliamentary precedent that a high threshold is set for any successful reliance upon this exception. If an employer claims that a distinction on the ground of disability is necessary for reasons of health, safety or security, they must duly substantiate their claim.[234] If there is a possibility of removing the risk by means of an effective and reasonable accommodation, it is not possible to rely on the exception.[235] There are a few points that need further clarification. Under the Working Conditions Act and under civil employment law, the employer has a duty to eliminate/reduce, as far as possible, any risk

[232] For two cases in which the (former) ETC concluded that a distinction on the ground of nationality amounted to direct discrimination on the ground of race/ethnicity, see Opinion 2011-97 and 2011-98. A critical note to these Opinions was written by Böcker, A. and Dursun-Aksel, S. in Forder, C. J. (2012*), Oordelenbundel 2011* ('NIHR Opinions 2011'), Wolf Legal Publishers, pp. 460-464.

[233] This provision often seems to be confused with Article 3 (1)(a) of the DDA, which mirrors Article 2(5) of the directive, which is aimed at national legislation that is necessary for reasons of public health and safety. This exception is discussed later in this report in Section 4.8.

[234] The NIHR applies a strict test, see e.g. opinion 2016-9.

[235] See also Hendriks, A. C. (2003), *Wet gelijke behandeling op grond van handicap of chronische ziekte* (The Act on equal treatment on the ground of disability or chronic illness), Deventer, Kluwer, pp. 66-67. Again, this is the line taken by the NIHR, see opinion 2016-9.

to the health and well-being of their employees. It is not fully clear from parliamentary precedent or from case law whether an employer can exclude a disabled person on the ground that the work will pose a risk to the disabled person's own health or safety (but not the health and safety of others). Neither is it clear whether a disabled individual can decide for themselves that they wish to accept such a risk. Moreover, it is not clear whether the employer would be excluded from liability should the disabled individual suffer harm in such circumstances. Further judicial interpretation is therefore needed.

The exception regarding health and safety can also be applied to age (see Article 3(1)(a) of the ADA). A similar counterpart exception has not been included in the GETA. However, safety and security issues may come to the surface in the 'objective justification test' for indirect discrimination cases. For example, a prohibition of headscarves during gymnastics for reasons of health and safety can be objectively justified.[236]

It should be noted that there has been some debate about the question of whether this is a shortcoming in the GETA.[237] In the framework of the third evaluation report of the equal treatment legislation it was suggested that a general exception concerning public health and security (*gevaren voor de volksgezondheid*) be included in the GETA.[238] Yet, the evaluation of the NIHR for the period 2012-2017 led to a different conclusion. As the need for an exception only surfaced very sporadically and was always resolved in a practical manner it was deemed unnecessary to amend the law by both the NIHR and the Government.[239]

4.6 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.6.1 Direct discrimination

In the Netherlands, national law provides an exception for direct discrimination on age. Article 7(1) of the ADA reads:

> 'The prohibition of making a distinction shall not apply if the distinction: a) is based on employment or labour market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament; b) relates to the termination of an employment relationship because the person concerned has reached the pensionable age under the General Old Age Pensions Act (AOW), or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties; c) is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.'

a) Justification of direct discrimination on the ground of age

In the Netherlands, it is possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age. From Article 7(1) of the ADA it follows that in two specific circumstances direct discrimination may be justified (see Article 7(1)(a) and (b)).

---

[236] The ETC (now the NIHR) applies this exception (strictly) in inter alia the context of religious discrimination, where sometimes it is argued that a prohibition of the Islamic headscarf must be allowed for reasons of safety. See e.g. ETC 2011-195.

[237] See ETC Opinion 2006-20 and ETC Opinion 2007-85, in which the ETC deemed a measure which rejects homosexual blood donors legally justified, in spite of the lack of a legal provision to justify directly a distinction based on sexual orientation because of public health risks. In NIHR Opinion 2015-46, however, the NIHR found the protection of public health cannot justify the measure (in doing so it seems to be more strict than CJEU Case C-528/13 *Léger,* 12 June 2015 ECLI:EU:C:2015:288).

[238] ETC (2011) *Third evaluation report (2004-2009)*, p. 8.

[239] See *Evaluatie Wet College voor de rechten van de mens* (Evaluation of the NIHR Act), Tweede Kamer, 2017-2018, 34 338, no. 3, p. 11.

Both direct and indirect age distinctions may be 'objectively justified' under Article 7(1)(c) of the ADA. Thus the NIHR held that the employment agency 65+, which mediates exclusively for people who have reached the statutory pensionable age (*AOW-leeftijd)* did not violate the ADA by refusing to mediate for a man aged 64, who had not yet reached this age. It accepted that the weak labour market position of the group concerned provided an objective justification.[240] Regarding the exclusion of workers who have reached the statutory pensionable age from being eligible to transition severance pay if they are dismissed the Supreme Court held that this exclusion is objectively justified. The Court explicitly considered this issue in the light of Directive 2000/78/EC and assessed whether the exclusion served a legitimate aim and was appropriate and necessary to achieve that aim. As transition severance pay seeks to support employees who depend on paid work to provide for themselves and people who reach the statutory pension age become eligible for a statutory pension benefit, it concluded that this was indeed the case.[241] The situation in this respect is in line with the requirements set out by the CJEU in *Mangold*.[242]

In the Netherlands, special benefits in the field of vocational education are available to people under 30 years of age with a view to promoting their position on the labour market. Such benefits are compatible with the justification ground of Article 7(1)(a) ADA, provided that they are based on a provision in a formal statutory act (see further Section 4.6.2).

b) Permitted differences in treatment based on age

In the Netherlands, national law permits differences in treatment based on age for any activities within the material scope of Directive 2000/78/EC. Article 7(1)(a) and (b) of the ADA enshrine two exceptions that are deemed *a priori* to be 'objectively justified' because, according to the Government, they are closely linked to the justifications mentioned in the directive.

Subsection (a), which is the transposition of Article 6(1) of the directive, provides that the prohibition of age distinction shall not apply if the distinction is based on employment or labour market policies which are aimed at promoting labour participation of certain age categories, provided that such policies are enshrined in a Statutory Act or in a Governmental Decree.

Subsection (b) provides that the prohibition of age distinction shall not apply if the distinction regards the termination of the employment relationship, by reason of having reached either the statutory pensionable age or a *higher* (not lower!)[243] age than that, provided this higher age has been laid down by statutory act or governmental decree, or has been mutually agreed on by the parties involved.

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In the Netherlands, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2). Article 8 of the ADA provides that the prohibition against making a distinction is not applicable with regard to (occupational) pension schemes and actuarial calculations for pension provision. Article 8(2) provides, in essence, that the prohibition of a distinction on the ground of age shall not apply to the admission or entitlement to pension provision,[244] nor to the fixing under such provision of different ages for employees or categories of employees. Article 8(3) of the ADA renders this norm non-applicable with

[240] NIHR Opinion 2018-107.
[241] Hoge Raad 20 April 2018, ECLI:NL:HR:2018:651.
[242] Case C-144/04, *Mangold v Helm* [2005]*,* ECR I-9981.
[243] It follows from the Explanatory Memorandum that subsection b does not apply to dismissals based on reaching a pensionable age which is *lower* than 65 years. See Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 32.
[244] A concept defined in Article 8(1) of the ADA.

regard to the use of age criteria in actuarial calculations. This has not been changed in response to a preliminary ruling of the European Court of Justice concerning the interpretation of Article 6(2) of the Employment Equality Directive.[245]

The directive states that the exception made by Article 6(2) may not lead to discrimination on the ground of sex. This clause has not been added to the Dutch ADA. However, this is regulated in the sex-discrimination legislation (see Article 12b and 12c of the ETA.)

4.6.2 Special conditions for young people and older workers

In the Netherlands, there are special conditions set by law for older or younger workers in order to promote their vocational integration. Article 7(1)(a) ADA enshrines an exception for policies that are aimed at the promotion of labour market participation by certain age categories. No special conditions exist for people with caring responsibilities.

This article reads as follows: 'The prohibition on making a distinction shall not apply if the distinction: a) is based on employment or labour market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament (…)'.

In the Netherlands special benefits in the field of vocational education are available to people under 30 years of age with a view to promoting their position on the labour market. These benefits include the possibility of deducting study costs from tax payments as well as the availability of study grants and facilities for disabled students. In the *De Lange* judgment the CJEU considered that the Dutch tax advantages for students under 30 fell within the scope of Article 3(1)(b) Employment Directive (access to vocational training), and that such advantages were justified in view of the objective of 'promoting the position of young people on the labour market' and therefore compatible with the exception of Article 6(1)(a) of the Directive.[246] The same justification was accepted by the Dutch courts with regard to other facilities that are only available to people under 30, in particular study grants and the option to use publicly funded sign language interpreters.[247]

4.6.3 Minimum and maximum age requirements

In the Netherlands, there are no exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training. However, this would be possible on the basis of a broad reading of the exception under Article 7(1)(a) or Article 7(1)(c) of the ADA (general possibility of an objective justification).

4.6.4 Retirement

a) State pension age

In the Netherlands, there is a state pension age at which individuals must begin to collect their state pensions. The statutory pensionable age used to be 65, but has been raised gradually from January 2013 onwards. In 2021 the general pensionable age will be 67 and will from then on be raised in accordance with general increases in life expectancy.

If an individual wishes to work beyond the state pension age, the pension cannot be deferred. Every citizen receives a state pension on the basis of the General Old Age Pensions Act from the statutory pensionable age onwards.

[245] Case C-476/11, *HK Danmark v Experian A/S*, 26 September 2013.
[246] Judgment of 10 November 2016, *J.J. de Lange,* C-548/15, EU:C:2016:850, Paragraph 27.
[247] District Court of Amsterdam 16 October 2017, ECLI:NL:RBAMS:2017:7691; Central Appeals Tribunal 8 September 2017, ECLI:NL:CRVB:2017:3229.

An individual can collect a pension and still work, as the right to receive a state pension (AOW) at the statutory pensionable age is independent of the question of whether the person has (or has had) a paid job. In 2015, the regulation of working after reaching pensionable age was simplified. The so-called Ragetlie rule (Article 7:667(4) Civil Code) (which provides that a fixed-term contract replacing a permanent contract within six months with the same (or subsequent) employer does not end by operation of the law), no longer applies when the employment contract ends after the individual reaches the statutory pensionable age. This means that it is possible to agree upon a fixed-term contract for employees reaching the pensionable age, even if such an employment contract succeeds a permanent contract.

b) Occupational pension schemes

In the Netherlands, there is no standard age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. The date on which benefits can be collected under these schemes depends on the conditions under which such schemes are contractually agreed.

If an individual wishes to work for longer, payments from such occupational pension schemes can be deferred. Some schemes are more flexible than others as far as an individual's wish to work longer is concerned.

An individual can collect a pension and still work. It is possible for an individual to collect a pension under the occupational pension scheme and on top of that to have other income, e.g. from a paid job.

c) State imposed mandatory retirement ages

In the Netherlands, there is no state-imposed mandatory retirement age. However, in some professions there are age limits that are regulated by law or by a professional organisation (e.g. the National Organisation of General Practitioners). These are also regularly included in a collective labour agreement (*collectieve arbeidsovereenkomst*).

d) Retirement ages imposed by employers

In the Netherlands, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and collective bargaining.

Many employment contracts contain an automatic dismissal clause (*pensioenontslagbeding*), which stipulates that the contract ends automatically upon the employee reaching the statutory pensionable age. There have been many legal proceedings on the question of whether these dismissal clauses are valid, but in 2012 it was decided by the Dutch Supreme Court that such a clause is valid, even if it concerns a permanent employment contract.[248] Since 2015, Article 7:669(4) Civil Code also provides that employers may terminate the employment contract if the employee has reached the statutory pensionable age.

Article 7(1)(b) of the ADA, moreover, reads as follows:

> 'The prohibition on the making of a distinction shall not apply if the distinction: (b) relates to the termination of an employment relationship because the person concerned has reached pensionable age under the General Old Age Pensions Act (AOW), or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties; (...).'

[248] Supreme Court, 13 July 2012, ECLI:NL:HR:2012:BW3367.

The Government holds the view that this exception is fully in compliance with the directive. This view has not been contested in Parliament or in academic literature, as far as the author of this report is aware.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age.[249] As long as someone is an employee with a permanent contract, according to the definitions of these laws, they are protected by the civil laws regulating employment rights and by the ADA, regardless of age. Employees with temporary contracts have no protection against dismissal when the contract ends. However, it is prohibited not to renew a temporary contract on discriminatory grounds.[250] It should be noted that employers who do allow people who have reached the statutory pensionable age to continue working for them do so mostly on the basis of a temporary contract.

f) Compliance of national law with CJEU case law

Dutch national legislation is in line with the CJEU case law on age regarding compulsory retirement.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In the Netherlands, national law permits age or seniority to be taken into account in selecting workers for redundancy. The Explanatory Memorandum to the ADA explicitly mentions that the use of the 'last in, first out principle' (which works to the advantage of older workers) could be objectively justified under Article 7(1)(c) of the Act. This is, however, not the principle provided by Dutch employment law, which by default stipulates that the employer, in case of a collective dismissal, should select redundant employees on the basis of a balancing principle, the so-called 'mirror image rule' (*afspiegelingsbeginsel*), under which account must be taken of the age balance of the workforce.[251]

b) Age taken into account for redundancy compensation

In the Netherlands, national law provides compensation for redundancy. A major overhaul of Dutch labour law in 2015 introduced a system of 'transitional severance pay' (*transitievergoeding*).[252] In the new system, the compensation is solely based on the employee's number of years of service. The new system reduces the inequalities between older and younger employees, although a difference remains.

4.7 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In the Netherlands, national law includes exceptions that seem to rely on Article 2(5) of the Employment Equality Directive. It can be maintained that Articles 3(1)(a) of the ADA and DDA are (also) implementing Article 2(5) of the directive. (Article 3(1)(a) DDA,

[249] This is without prejudice to the fact that the employer may terminate the employment contract if the employee has reached the statutory pensionable age as mentioned above under d).

[250] However, there are many examples in the case law of the ETC (now the NIHR), especially relating to women not receiving an extension of a temporary contract once the employer discovers they are pregnant. The author of this report assumes that similar cases may exist for the grounds of race/ethnicity and age.

[251] Article 11 Dismissal Decree 2015 (*Ontslagregeling 2015), Staatscourant 2015*, 12685.

[252] Labour and Security Act (*Wet Werk en Zekerheid)*, *Staatsblad 2014*, 216.

moreover, probably implements Article 7(2) of the directive as well.) However, in this case the requirement that any such health and safety measures must be based on a law is not included in the Dutch equal treatment legislation.

It should be noted that the GETA, concerning inter alia the grounds of religion, race and ethnicity, sexual orientation and sex, does not contain any such public health and security exception.

4.8 Any other exceptions

In the Netherlands, other exceptions to the prohibition of discrimination (on any ground) provided in national law are the following:

1. Article 5(3) of the GETA contains an exception regarding the private nature of the employment relationship. Article 7(3) of the GETA, concerning the provision of goods and services, contains an exception regarding the private nature of the circumstances in which the legal relationship takes place (for example, a woman who rents out a room in her own house may lawfully require that the person who rents the room is a woman).[253] It expressly states that it is only possible to rely on this exception when the aim is legitimate and when the means are appropriate and necessary. With respect to discrimination in the area of goods and services, the exception is not applicable to the ground of race.[254]
2. Article 7(2) of the GETA grants private educational institutions (which are generally funded by the state on an equal basis with state schools) the freedom to impose requirements governing admission to or participation in the education that the institution provides. Denominational schools based on both Christian and non-Christian or philosophical beliefs are equally funded. Article 7(2) is in accordance with the exception in Article 5(2)(c) of the GETA. However, this Article 7(2) applies to the admission of pupils to denominational schools and thus not to employment.
3. The internal affairs of associations fall outside the scope of the GETA. This follows from Parliamentary precedent and is not explicitly provided for in the GETA.[255]

[253] This topic has been discussed in great detail in the second evaluation report about the functioning of the GETA. See Hertogh, M. L. M. and Zoontjens, P. J. J. (eds.) (2006), *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling* (Equal treatment: principles and practice. Evaluation report on the General Equal Treatment Act), Nijmegen, Wolf Legal Publishers. The part about the relationship between equality and freedom of association and the right to privacy was written by Professor Paul Zoontjens. See pp. 175-216.

[254] The current provisions were adopted in 2011 after an infringement procedure by the Commission. The former provisions included broader exceptions than EU law allows for.

[255] This topic has also been discussed in great detail in the second evaluation report about the functioning of the GETA. See www.mensenrechten.nl/nl/publicatie/10026.

5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) Scope for positive action measures

In the Netherlands, positive action is permitted in national law in respect of sex, racial or ethnic origin and disability (Article 2(3) GETA; Art. 3(1)(c) DDA).

The Government defends the position that positive action is only possible with respect to sex, race and disability with the reasoning that only on those grounds do groups of people suffer from *structural disadvantages* in society. Structural disadvantage is defined as 'suffering disadvantages in several social fields at the same time which are not temporary in nature'.[256]

Article 2(3) of the GETA (covering race and sex) imposes the following conditions on positive action measures and policies:

1. the initiative must be a *specific measure*;
2. the measure is intended to confer a preferential position on women or people belonging to ethnic or cultural minorities;[257]
3. the measure is intended to *remove* or *reduce* actual inequalities;
4. there must be a *proportionate* relationship between the measure and the objective pursued. This last element is not required by Directive 2000/43/EC.

The Dutch definition leaves less room for positive action policies and programmes, since it does not allow measures which aim to *prevent,* in addition to *removing* or *reducing* disadvantages.[258]

It should be noted that the proportionality principle is explicitly mentioned in the GETA, which means that in every case brought before the courts or the NIHR, the following aspects of the positive action plan must be tested:

- does the plan have a clearly described aim? (which must be legitimate in itself);
- is the plan appropriate and necessary to achieve this aim? (Is it potentially effective and / or could the aim be achieved with less damaging/ discriminatory means?).

Article 3(1)(c) DDA enshrines a positive action exception to the prohibition to make a distinction on the ground of disability under that Act. The same conditions as described above apply here.

In practice, any contested positive action plan is tested by the NIHR, according to the standards that are set out in the case law of the CJEU.

The general point of view is that – at least when the positions that are at stake are to be considered as employment relationships – EU legislation and case law (most notably the *Kalanke* case) prohibit a system of fixed quotas and require an individual assessment of any job applicant's capabilities and suitability for the job in the context of sex.[259] Any policy in which a company or organisation strives for *proportional representation* of various ethnic groups in proportion to their prevalence in society is seen as direct discrimination. When the aim of such a policy is simply achieving 'proportionality' or 'diversity' (i.e. when the aim is not to put people belonging to an under-represented or systematically disadvantaged group in a better position), the specialised body will not apply the positive

[256] See Tweede Kamer, 2001-2002, 28 169, no. 5, p. 17.
[257] The concept of 'ethnic or cultural minority group' is not defined in Dutch law, but it is usually applied as 'being of non-western origin'.
[258] See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 9.
[259] Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995], ECR I-3051.

action exception (and therefore the policy will be illegal).[260] At the same time, several other cases show the equality body is not always as strict where positive action regarding ethnic minorities is at stake. Thus in two cases where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers and excluded people of Dutch origin, it ruled that the preferential treatment of ethnic minorities was allowed.[261]

In its third evaluation report the ETC (now the NIHR) concludes that the provisions concerning positive action in the GETA and DDA are adequate and do not need revision. The equality body defends its restrictive interpretation of this exception with reference to CJEU case law and maintains that, when overcoming structural disadvantages of certain groups is deemed necessary, general social policy measures should be developed that can address these disadvantages effectively.[262] However, in December 2012 the NIHR applied a less strict criterion and accepted 'exceptional circumstances' in a sex discrimination case.[263]

As far as the DDA is concerned, in addition to the positive action measures as set out in Article 7(1) of the Employment Framework Directive, there are also general supportive measures for disabled people, as set out in Article 7(2) of the directive. This provision has been transposed by Article 3(1)(b) of the DDA, which enshrines the possibility of supportive social policies for disabled people. In contrast to 'positive action measures', these measures are not time-restricted. In recent years, the Government has introduced several supportive measures designed to promote the (re)integration of disabled people into society.

The ADA does not contain a positive action exception clause,[264] but since unequal treatment on the ground of age may be objectively justified (open system of justifications) in any case the defence that the unequal treatment is in fact a positive action measure may be put forward and will be tested in the same way as described above.

The National Action Programme against Discrimination which was launched in 2016 includes the promotion of diversity in the labour market more generally as one of its four main starting points. The goals set do not include hard quotas but are directed at stimulating broad, general policies by both public and private employers to improve diversity. (For more information on the programme see below in Section 9.) The programme does not pay specific attention to positive action regarding migrants.

In 2016 the MP Joram van Klaveren, a former member of the extreme right Freedom Party (PVV), introduced a legislative proposal to eliminate the possibility for positive action measures from the Dutch equal treatment legislation.[265] To date the proposal has not been debated, which can be taken as a sign that it will never be adopted.

b) Quotas in employment for people with disabilities

In the Netherlands, national law provides for quotas for the employment of people with disabilities. To encourage employers to employ disabled people, concrete targets for job creation for this category of workers were set in 2015: the private sector is to create 100 000 additional jobs by 2026, the public sector 25 000.[266] These targets apply to employers with over 25 employees in both the public and private sectors. If employers do

[260] See ETC Opinion 1998-105 and ETC Opinion 2012-50.
[261] ETC 1999-31 and 1999-32.
[262] ETC (2011) *Third evaluation report (2004-2009)*, 7.
[263] NIHR 2012-189.
[264] One might read a positive action exception in Article 7(1) of the ADA, which states: 'The prohibition of discrimination shall not apply if the discrimination: a) is based on employment or labour market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament.'
[265] Tweede Kamer 2015/2016, 32 521, no. 2.
[266] Act putting in place an agreement on jobs and quota for people with a disability in employment (*Wet banenafspraak en quotum arbeidsbeperkten*), *Staatsblad* 2015, 154.

not meet these targets a 'quota charge' (*quotumheffing*) may be levied. While the private sector has thus far succeeded in creating the required number of extra jobs, this has not been true for the public sector. As a consequence, the quota charge was introduced for this sector too, taking effect as of 1 January 2018.[267] In April 2019 the government and education sectors agreed to jointly step up their efforts to create more public sector jobs for people with disabilities.[268]

An evaluation of the quota system conducted in 2019 confirmed that up to the end of 2018 the targets for job creation were met, largely on account of the private sector.[269] The positive results were partly ascribed to the favourable economic climate. It was observed that the setting of targets had also increased awareness of the need to make jobs available to people with disabilities. A simplification of the applicable legislation regarding the quota system was announced to make the quota system more effective.[270]

[267] This is done by a ministerial decree (*ministeriële regeling*). The quota charge amounts to EUR 5 000 for each 'missing' job, see *Regeling activering quotaheffing*, *Staatscourant* 2017 no. 58942: https://zoek.officielebekendmakingen.nl/stcrt-2017-58942.html.
[268] Tweede Kamer 2018/2019, 34 352, no. 165.
[269] Eerste Kamer 2019/2020, 33 981, no. O. See also Tweede Kamer 2018/2019, 34 352, no. 166.
[270] Eerste Kamer 2019/2020, 33 981, no. O.

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

a) Available procedures for enforcing the principle of equal treatment

In the Netherlands, the following procedures exist for enforcing the principle of equal treatment: judicial procedures (criminal, administrative and civil) and alternative dispute resolution, namely the procedure before the equality body, the NIHR.

The principle of non-discrimination can be enforced by means of criminal law procedures. Criminal law provisions may be applied in as far as the offences / discrimination fall under the definition of discrimination in Article 90quater of the Criminal Code. In 2016, for example, Geert Wilders MP, the leader of the right-wing Party for Freedom (*Partij voor de Vrijheid*, *PVV*) was convicted for insulting Moroccans. The District Court accepted the claim that, under the circumstances, this constituted incitement to discrimination against a group of people on the ground of their race, as prohibited by Article 137c of the Criminal Code. It rejected the claim of incitement to hatred. The Court did not impose a punishment, considering that the most important question at issue was whether Wilders crossed a line and that justice was done by means of the judgment itself.[271] The appeal against the verdict is still pending.

The following paragraphs leave aside criminal law offences and concentrate on civil law equal treatment norms and their enforcement.

The GETA, DDA and ADA do not entail compulsory judicial procedures. If discrimination occurs in the sphere of private employment, civil (labour) law procedures apply. If it occurs in public employment, the procedures of administrative employment law apply. The civil courts also have competence in cases in which discriminatory contractual agreements (goods and services supplied by private parties or the Government) are concerned. Outside the area of contract law, an instance of discrimination (e.g. harassment) can be considered as tort and be dealt with in a civil law court procedure. The administrative courts have competence with respect to public employment contracts (civil servants) and administrative decisions.[272] Government actions can also be considered as tort (*onrechtmatige overheidsdaad*) in which case a civil court is competent to hear the case.[273]

In addition to this, the equal treatment legislation provides for a special (non-compulsory) procedure before the NIHR, which has a section that deals with complaints about discrimination. The NIHR is a quasi-judicial body which issues non-binding Opinions. After it has issued an Opinion, a complaint may still be lodged before a conventional civil/ administrative court if the applicant wishes to obtain a binding judgment. The NIHR is a low-threshold body: no legal representation is required.

Moreover, the procedure before the NIHR is free of charge. As for civil law and administrative law procedures in court, there is a system of free legal aid for people on very low incomes.

There are no specific legal rules requiring courts / the NIHR premises to be physically accessible for people with disabilities; general rules about accessibility do apply to these buildings. Neither is it specified anywhere that information must be provided in Braille.

---

[271] District Court of The Hague 9 December 2016 (case Wilders) ECLI:NL:RBDHA:2016:15014 (in Dutch only) https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014. Summary in English: www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Nieuws/Paginas/Wilders-found-guilty-of-insultment-of-a-group-and-incitement-to-discrimination.aspx.

[272] However, it should be borne in mind that, in principle, 'unitary legislative acts' (*eenzijdig overheidshandelen*) are not covered by the equal treatment legislation, see Section 3.2.1.

[273] Such cases are based on Article 6:162 of the Civil Code.

However, the information on the legal system which is provided on the internet and in special brochures conforms with standards set by blind people's organisations. No special procedures exist for dealing with individuals with a learning disability. There is no legal obligation to provide sign language interpreting. However, information from the Ministry of Justice and Security states that special internal procedures for accessibility for people with disabilities do, in fact, exist in a handbook and that, in practice, sign language interpreting is available.

People who feel they have been discriminated against may submit a complaint to the NIHR in writing (Article 10 NIHR Act). For non-Dutch people this is not always an easy task and therefore it is possible to lodge the complaint during an interview at the NIHR office. By analogy, special measures could be taken for people with a disability.

b) Barriers and other deterrents faced by litigants seeking redress

The costs litigants seeking redress face are limited, as it is not mandatory to instruct a lawyer for proceedings in civil law, administrative law or at the NIHR. Time limits differ. However, fees to gain access to court procedures have been increased in recent years. Many commentators fear that this will raise the threshold for victims of (inter alia) discrimination seeking redress in court.

Administrative law procedures: the General Act on Administrative Law (AWB) provides that, in principle, an appeal must be lodged within six weeks of the day after the day on which the contested decision was delivered.

Civil law procedures: according to Article 8(2) of the GETA (Article 9(2) DDA and Article 11(3) ADA) an applicant who wishes to contest the lawfulness of the termination of an employment contract (discriminatory dismissal/dismissal related to victimisation) must do so within two months of the termination of the employment contract (see also Articles 7:647(2), 7:649(2) and 7:648(1) Civil Code). A legal claim with regard to the nullification of the employment contract can no longer be made once six months have passed after the day on which the employment contract was terminated (Article 8(3) of the GETA; Article 9(3) DDA; Article 11(4) ADA). A procedure based on tort law must be initiated before the general five-year limitation period under Article 3:310 Civil Code has expired.

NIHR procedures: Article 12(1)(c) of the NIHR Act only sets the requirement that a complaint must be lodged within a reasonable period (this also applies in the context of procedures lodged under the DDA and ADA).

c) Number of discrimination cases brought to justice

In the Netherlands, statistics are available on the number of discrimination-related cases brought to justice. The National Expertise Centre on Discrimination (*Landelijk Expertise Centrum Discriminatie*, LECD), which forms part of the Public Prosecution Service, publishes statistics on criminal discrimination cases, including both discrimination offences (hate speech and exclusion) and regular offences committed with a discriminatory motive. During 2018, 83 discrimination offences were submitted to the Public Prosecution Service, as well as 312 offences with a discriminatory motive.[274] The majority of the offences (51 % of discrimination offences and 61 % of offences with a discriminatory motive) concerned racial/ethnic discrimination and around half of these concerned anti-black discrimination. The LECD report also includes information on, inter alia, the nature of offences, numbers of offences per region and characteristics of the perpetrators.

[274] Openbaar Ministerie, *Cijfers in beeld 2018. Overzicht discriminatiecijfers Openbaar Ministerie* (Figures for 2018. Overview of discrimination figures from the Public Prosecution Service), available at: https://www.om.nl/onderwerpen/discriminatie/documenten/publicaties/discriminatie/lecd/cijfers-in-beeld/cijfers-in-beeld.

According to the same report, 91 court judgments were issued in 2018 in cases involving discrimination offences. In 76 of these cases the suspect was convicted for one or more offences.[275]

In the context of the National Action Programme against Discrimination initiated in 2016 (see Section 9 for more detail) a measure has been implemented to bring together the data dealing with reports of discrimination to the police, the Public Prosecutor, the Reporting Point for Internet Discrimination (MIND in Dutch) and the equality bodies. In 2019 there was an increase in reports to each of these bodies, whereas 2018 had seen a reduction in reports to the police, the MIND and the local Anti-Discrimination Facilities (*Anti-Discriminatievoorzieningen*, ADVs) and an increase only in reports to the NIHR.[276] The reports to the NIHR and ADVs are dealt with in more detail in Chapter 7.

d) Registration of discrimination cases by national courts

In the Netherlands, discrimination cases are not registered as such by national courts.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) Engaging in proceedings on behalf of victims of discrimination (representing them)

In the Netherlands, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination. Under Article 3:305a of the Civil Code interest groups in the form of an 'association or foundation' with full legal powers can take legal action in court on behalf of people whose (similar)[277] interests have been damaged; i.e. also on behalf of victims of discrimination.

According to Article 3:305a of the Civil Code, *private* associations and foundations can act on behalf of victims of discrimination, provided that they are an association or foundation with full legal powers according to civil law and provided that their statutory goals cover this particular interest (e.g. combating discrimination in general or enhancing disability rights). Proof of this is requested by the court and can be given by showing the deed or act by which the association or foundation was founded.

A law was adopted in 2019 which has significantly increased the requirements to be met by foundations or associations seeking to engage in proceedings on behalf of victims of discrimination.[278] This act has made it possible for such foundations or associations to claim pecuniary damages on behalf of those represented, whereas previously damages could only be claimed by individual victims. However, foundations and associations engaging in collective action on the basis of Article 3:305a Civil Code now have to meet a series of conditions, including procedures for the representation of the persons on whose behalf they are acting and a generally accessible website providing information about, inter alia, the foundation or association itself, the proceedings it is engaged in and the possibilities for membership.[279] Additional requirements have also been introduced as to the

[275] Openbaar Ministerie, *Cijfers in beeld 2018. Overzicht discriminatiecijfers Openbaar Ministerie* (Figures for 2018. Overview of discrimination figures from the Public Prosecution Service), available at: https://www.om.nl/onderwerpen/discriminatie/documenten/publicaties/discriminatie/lecd/cijfers-in-beeld/cijfers-in-beeld, p. 35. Where a suspect has been prosecuted for multiple offences, the conviction may not have been for the discrimination offense. The report does not contain information on court decisions concerning common offences with a discriminatory motive.

[276] *Discriminatiecijfers in 2018*, published as Annex to Tweede Kamer 2018/2019, 30 950, no. 174 and *Discriminatiecijfers in 2019,* published as Annex to Tweede Kamer 2019/2020, 30 950, *no. 184*

[277] That is, similar to the organisation.

[278] Act on the settlement of damages in collective action cases (*Wet afwikkeling massaschade in collectieve actie*), *Staatsblad 2019*, 130. The Act entered into force on 1 January 2020.

[279] Article 3:305a(2) Civil Code.

admissibility of collective action claims, including the requirement that the claim must be sufficiently connected with the Dutch legal order.[280]

Courts may accept collective action claims made by foundations or associations that do not meet the newly imposed requirements if the claim is of an idealistic (non-commercial) nature and the financial interests involved are very limited. In that case, however, no pecuniary damages may be sought.[281]

Besides private foundations and associations, *public* law organisations such as the State, local councils or public bodies like the Bar Association are entitled under Article 3:305b of the Civil Code to act on behalf of victims of discrimination. The article does not mention 'in support' of victims, only 'on behalf' of them, but entitles public bodies to act on behalf of victims, 'insofar as these interests are entrusted to the particular organisation'. Protection against discrimination can be seen as an important general task of most public bodies. However, the author of this report is not familiar with any such body taking concrete legal action against discrimination.

Before an organisation can act, two conditions must be met. Firstly, the organisation must represent 'similar interests'. This means that the interests represented must be similar to the interests of the organisation. Secondly, the organisation must (before taking the case to court) have tried to obtain satisfactory compensation or rebuttal from the perpetrator or otherwise have tried to come to an agreement (see Article 3:305a(3)(c) and Article 3:305b(2) of the Civil Code).

There are no associations or public bodies that have a specified legal duty to take legal action against discrimination or to act on behalf of victims of discrimination. There are some organisations (such as Art.1, a national expert centre in this area and local Anti-Discrimination Facilities (ADVs)) which receive a subsidy from central or local government, provided that they fulfil the function of assisting victims of discrimination. However, it certainly cannot be regarded as a legal duty to initiate legal actions on behalf of victims.

b) Engaging in proceedings in support of victims of discrimination (joining in existing proceedings)

In the Netherlands, associations, organisations and trade unions are entitled to act in support of victims of discrimination, on the basis of Article 3:305a Civil Code. They do, however, need authorisation from the victim(s) to do so. The same conditions as described above under a) apply.

c) Actio popularis

In the Netherlands, national law allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

These cases are called 'general interest actions' (*algemeen belangacties*). Even if no victims have come forward, or if victims are not known, this action is possible if it is in the public interest. The interest may be quite diffuse (e.g. 'combating racial stereotypes'). This procedure is allowed under Articles 3:305a(1) and 3:305b(1) of the Civil Code (discussed above) and Article 1:2(3) of the General Act on Administrative Law (AWB). The law speaks of 'bringing legal action to protect similar interests of other persons'. Case law shows that

[280] Article 3:305a (3) Civil Code. Article 3:305a (3)(b) specifies that the requirement of a sufficient connection with the Dutch legal order is met if the majority of the persons in whose interest the claim is made are usually resident in the Netherlands, or the person against whom the claim is made is usually resident in the Netherlands and additional circumstances indicate a sufficient connection with the Dutch legal order, or the claim concerns an event or events that have taken place within the Netherlands.

[281] Article 3:305a (6) Civil Code.

in practice it appears difficult to meet the admissibility criteria for this type of action. Courts seem to be reluctant to grant admissibility without a specific victim being involved in the proceedings.[282]

The same types of organisations (associations and foundations) as mentioned above have this possibility. They may use the court procedures (excluding criminal procedures), as described above and may seek the same remedies (i.e. injunctions, legal declarations (*'verklaring voor recht')* or pecuniary damages, if the conditions are met). The burden of proof is also the same as in any other discrimination case. These organisations also have the right to ask the NIHR to start an investigation into (alleged) discriminatory practices. Again, the organisation must have full legal powers and it must follow from its statutes that it represents the interests of those whose protection is the objective of the statutory equality acts (Article 10(2)(e) NIHR Act). However, if the claim mentions specific individuals who are believed to have suffered discrimination, the case can only be investigated by the NIHR if those individuals agree to it (Article 10(3) NIHR Act).

d) Class action

In the Netherlands, national law allows associations, organisations and trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

This is called a 'group action' (*groepsactie*). This kind of legal action is possible if a group of people suffers as a result of the same rules, events or acts and if a foundation or association brings one case on behalf of all of them (without specifying the names of the victims). Group actions may overlap with *actio popularis* and both are covered by the general provisions on collective actions (Article 3:305a Civil Code and Article 1:2(3) General Act on Administrative Law), both of which have been discussed above. The law speaks of 'bringing legal action to protect similar interests of other persons'.

The same types of organisations (associations and foundations) as described above have this possibility. They may use the court procedures (excluding criminal procedures) as described above and may seek the same remedies. The burden of proof is also the same as in any other discrimination case.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In the Netherlands, national law requires a shift of the burden of proof from the complainant to the respondent.

Article 10(1) GETA reads as follows:

> 'If a person who considers themselves to have been wronged through "distinction" as referred to in this Act establishes before a court facts from which it may be presumed that distinction has taken place, it shall be for the respondent to prove that the contested act was not in contravention of this Act.'

The equivalent Articles in the DDA and ADA are Articles 10(1) and (2) and 12(1) respectively. Subsection 2 of these three Articles provides that the reversed burden of proof also applies in collective actions and general interest actions under Article 3:305a of the Civil Code and Article 1:2(3) of the General Act on Administrative Law. These rules apply for all forms of discrimination, including harassment. It should be noted that these rules do not apply in the case of victimisation (see the next section of this report).

[282] For a brief overview of relevant case law see *De ontvankelijkheid van belangengroepen bij rechtszaken* ('The admissibility of interest groups in legal proceedings') by the Strategic Interest Litigation Project (PILP): https://pilpnjcm.nl/wp-content/uploads/2015/10/De-ontvankelijkheid-belangengroepen-bij-rechtszaken-26102015.pdf (only available in Dutch).

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In the Netherlands, there are legal measures of protection against victimisation. All three Acts (GETA, DDA and ADA) protect against dismissal related to victimisation and against other forms of disadvantage as a result of the fact that a person has invoked a statutory equality act or has otherwise assisted in proceedings under these Acts, for example, by means of a testimony. See Articles 8 and 8a of the GETA. Equivalent articles are included in the DDA (Articles 9 and 9a) and in the ADA (Articles 10 and 11).

Article 8 of the GETA reads as follows:

> 'If an employer terminates an employee's contract of employment in contravention of Section 5, or on the ground that the employee has invoked Section 5, either in a court procedure or otherwise, or has assisted others in this respect, Article 681 of Book 7 of the Civil Code applies.'

The latter provision renders the termination voidable.[283]

Article 8a sub 1 of the GETA reads as follows:

> 'It is unlawful to disadvantage persons because they have invoked this Act, either in or out of court, or have assisted others in this respect.'

The provisions mean that people who assist a victim of discrimination are also protected by Articles 8 and 8a of the GETA, not just the victims. The shifting of the burden of proof does not apply to victimisation.[284] According to Monika Ambrus, the (then) ETC offered two ways for the claimant to prove that victimisation took place. Firstly, the claimant may prove that the complaint about discrimination led to a chain of events that eventually resulted in disruption of the labour relationship or even termination of the employment contract; secondly, the claimant may prove that the complaint was the only reason for the dismissal.[285] In its 2011 evaluation report, the ETC stated that, in practice, the burden of proof is not too arduous for the complainant. It therefore makes no recommendations to change the law on this point. However, at the same time it appears from the figures that in only seven out of 19 victimisation cases did the claimant win.[286] The (then) ETC made it clear that in a case of victimisation the prohibition is absolute, i.e. that no (objective) justification may be put forward.[287]

In 2008-2009, a study of the issue of victimisation was conducted on behalf of the then ETC.[288] It concerns the first large-scale research into this topic in the Netherlands. Previous smaller studies had shown that complaining about discrimination often leads to serious negative consequences, but also that many victims do not make official complaints for fear of victimisation. These findings were confirmed. The researchers found that serious forms

---

283 The term 'voidable' (*vernietigbaar*) means that it is not automatically void but that this may be established during a court procedure.

284 See also Ambrus, M. 'The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment' in *Nederlands tijdschrift voor de mensenrechten, NJCM-bulletin,* 2011 (1), pp. 9-23, at p. 20.

285 Ambrus, M. 'The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment' in *Nederlands tijdschrift voor de mensenrechten, NJCM-bulletin,* 2011 (1), p. 21.

286 ETC (2011) *Third evaluation report (2004-2009)*, p. 25. This report is the latest detailed evaluation of the GETA.

287 Ambrus mentions ETC Opinion 2006, 34, para. 3.19. See Ambrus, M. 'The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment' in *Nederlands tijdschrift voor de mensenrechten, NJCM-bulletin,* 2011 (1), pp. 9-23, at p. 20.

288 See van Genugten, M. and Svensson, J. (2010), *Dubbel de dupe? Een studie naar de benadeling van werknemers die gelijke behandeling aan de orde stellen* (Victim twice over: a study of disadvantages experienced by employees who raise the issue of equal treatment), University of Twente/ETC. The full report, as well as an English summary, are available at: www.mensenrechten.nl/publicaties/detail/10028.

of victimisation occurred most often in cases of discrimination on the ground of race, sex or disability, where they concerned discriminatory treatment in the workplace by colleagues and direct supervisors and where the claimant was in an isolated position at work. The report shows that it is certainly not enough to have established a prohibition of victimisation, but that much more needs to be done in terms of having in place an informal complaints procedure, having counsellors in the workplace who can deal with complaints confidentially, and giving training to people working for personnel departments and managers.[289] In 2019 a guideline was developed, at the request of the state secretary for Social Affairs and Employment, on the positioning and functioning of confidential counsellors to address undesirable behaviour within the workplace.[290]

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) Applicable sanctions in cases of discrimination – in law and in practice

The NIHR can only declare that a certain situation is in breach of equal treatment legislation. It cannot impose fines or damages to be paid to the victim.

Articles 11(2), 11(3) and 13 of the NIHR Act mention some specific (mostly soft law) sanctions that may be imposed by the NIHR. Under Article 11(2), the NIHR may make recommendations when forwarding its findings (in an Opinion) to the party found to have made an unlawful distinction. Under Article 11(3) the NIHR may also forward its findings to the ministers concerned, and to organisations of employers, employees, professionals and public servants, to consumers of goods and services and to relevant consultative bodies. Under Article 13(1), the NIHR may bring legal action with a view to obtaining a court ruling that a particular conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.[291] This power must be regarded in light of the fact that the NIHR's Opinions are not binding. The ETC never made use of this possibility. If a case is brought by interest groups, the sanctions under the GETA are similar.

Any other sanctions in discrimination cases must be imposed by a court. The system is such that, in case of criminal offences, fines and sentences may be imposed by a criminal court. This happened, for example, in 2014 in a case concerning a discriminatory email that was mistakenly sent to a job applicant (community sentence and fine),[292] and in 2015 for discriminatory remarks made on Facebook (the perpetrators were offered the possibility of settling their case by paying a fine).[293]

In the case of civil lawsuits, the main remedies to be granted by the courts include an injunction to comply with existing legal obligations (Article 3:296 Civil Code), a legal declaration (Article 3:302 Civil Code) and the award of pecuniary damages (Article 3:310 Civil Code). The availability of specific remedies depends on the legal relationship concerned, for example in employment cases an employer may be held accountable to pay pecuniary damages, to take preventive measures or to reinstate an employee who was unlawfully dismissed. In case of tort, an injunction may be imposed, as well as pecuniary sanctions. In case of collective actions the courts may decide that the judgment is to be made public (Articles 3:305a(4) and 3:305b(2) Civil Code). Administrative courts can annul

[289] In 2018 the NIHR dealt with three victimisation complaints, only one of which concerned a ground covered in this report. Victimisation was not considered to have been present (NIHR 2018-99).

[290] *Leidraad voor het positioneren en functioneren van vertrouwenspersonen ongewenste omgangsvormen op het werk*, published as Annex to Tweede kamer 2019/2020, 25 883, no. 365.

[291] This applies, unless the person affected by the alleged discriminatory conduct has imposed conditions (Article 13(2) of the NIHR Act). In theory this could amount to a court order, e.g. to make a desegregation plan for schools; however, the Dutch courts are very careful not to interfere with what they call the discretionary powers of the administration and the government.

[292] District Court of Gelderland, 27 August 2014, ECLI:NL:RBGEL:2014:5457.

[293] Official press release from the Public Prosecution Service regarding the three fines imposed.

administrative decisions found to be contrary to the law (Article 8:72(1) General Administrative Law Act) and award pecuniary damages in respect of unlawful administrative decisions or other unlawful conduct by administrative bodies (Article 8:88(1) General Administrative Law Act).

The following sanctions are specifically mentioned in the equal treatment legislation. According to Article 8 of the GETA, Article 11 of the ADA and Article 9 of the DDA, discriminatory dismissals and dismissals related to victimisation are 'voidable'. This applies to both public and private employment. The employee can ask the court to invalidate the termination of the contract and can thereupon claim wages. They can also request to be reinstated in the job or claim compensation for pecuniary damages under the sanctions of general administrative/ (labour) contract law or tort law.

Contractual provisions which are in conflict with the GETA, the ADA and the DDA shall be considered null and void. This follows from Article 9, Article 13 and Article 11 of these acts respectively.

b) Compensation – maximum and average amounts

In civil court cases there is no ceiling for the amount of damages or compensation that may be sought. Compensation for both material and non-material damages can be requested. The maximum amount of damages to be claimed before an administrative court is € 25 000, if the claim exceeds this amount the case will fall under the competence of the civil courts.[294] In criminal procedures, the Public Prosecutor is bound to the level of the fines set out in the criminal law provisions concerning discrimination.

The sanctions mentioned in the equal treatment legislation are not in terms of pecuniary damages but offer other 'remedies' (see above).

c) Assessment of the sanctions

Monetary compensation is very rarely granted. This only occurs when, for example, the judge agrees with the dismissal since employment relationships have been disrupted and, in that case, they set a relatively high sum to compensate for the termination of the contract.

No information can be given on the topic of sanctions without an extensive examination of the case law of the district courts. Generally, such cases are not published in official law journals. In addition, the registration of cases within the court system is not done systematically on the basis of the legal provisions at stake. Thus it might very well be that many cases are registered under the heading of a general provision like 'breach of labour contract' (with no specification about the reasons for this) or tort. Very generally speaking, it can be noted that Dutch courts are restrictive in granting damages that are not strictly material damages (e.g. unpaid wages). Non-material damages (e.g. hurt feelings) will only be compensated for minimally.

As to the question of whether the available sanctions have been shown to be – or are likely to be – effective, proportionate and dissuasive, as is required by the directives, it can be observed that the sanctions do not seem to be very dissuasive. It has never been properly investigated whether they are effective and proportionate, neither by the equality body, nor by any other institution.

[294] Article 8:89(2) General Administrative Law Act (*Algemene wet bestuursrecht*), *Staatsblad* 1992, 315, entered into force 1 January 1994. This is the case unless the administrative decision concerned falls within the exclusive or final competence of the Central Appeals Tribunal (*Centrale Raad van Beroep*) or the Supreme Court (*Hoge Raad*). Article 8:89(1) General Administrative Law Act.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

In the Netherlands, there are two types of equality body. First, there is a quasi-judicial (or tribunal type) body assigned with the tasks of hearing complaints about unequal treatment, drafting reports, giving advice to the Government and investigating possible instances of structural discrimination on its own accord. The material scope of the Netherlands Institute for Human Rights (NIHR) *(College voor de rechten van de mens)* mandate covers all areas covered by the General Equal Treatment Act (GETA), the Disability Discrimination Act (DDA) and the Age Discrimination Act (ADA), that is *grosso modo* employment and goods and services. This function is currently fulfilled by a department of the NIHR.[295] In 2012, the NIHR assumed all the tasks of the former Equal Treatment Commission (ETC) (*Commissie Gelijke Behandeling, CGB*) in this regard.[296] The ETC was the first officially designated body through which the Government implemented Article 13 of the Racial Equality Directive, although it was not officially appointed as such by a separate law or decree.[297] The status as an equality body follows from the tasks given to the NIHR in the NIHR Act (Articles 9-13 of the NIHR Act; originally Articles 11-21 of the GETA). Other equal treatment acts also assign these tasks to the NIHR (see Article 12 DDA and Article 14 ADA). On the basis of the NIHR Act, decrees have been adopted in order to regulate the legal status of members of the Institute and its staff[298] and the internal procedures of the department of the NIHR that deals with complaints about unequal treatment.[299]

The Dutch Government established the NIHR after long discussions about the best way to implement the Paris Principles.[300] The role of the former ETC regarding investigating complaints is fully integrated into the new NIHR and as such has not been changed. The establishment of the Institute also does not change the competences of the ADVs (see below) as regards their role in assisting victims. The role of assisting victims was never part of the ETC's work and is not part of the work of the NIHR, because it is deemed to be incompatible with the role of independently issuing legal opinions about discrimination complaints. The NIHR refers victims to the Anti-Discrimination Facilities (see below) for such assistance. In addition to the nine members of the previous ETC, three additional members were appointed to the NIHR.

The first evaluation of the functioning of the NIHR (covering 2012-2017) was positive. Of particular relevance for this report is the conclusion that its semi-judicial role regarding

[295] Act of 24 November 2011 containing the establishment of the Netherlands Institute for Human Rights (*Wet van 24 november 2011, houdende de oprichting van het College voor de rechten van de mens*); *Staatsblad 2011*, 573. The Act entered into force on 1 October 2012.

[296] The provisions of the General Equal Treatment Act in which the former ETC was regulated were repealed in the NIHR Act. Instead, the same tasks and authorities are now regulated in a specific chapter of the NIHR Act: 'Chapter 2: Investigations and findings relating to equal treatment' (Articles 9-13).

[297] This designation follows from statements from the government in various Parliamentary papers. See e.g. Explanatory Memorandum to the bill which led to the *EG-Implementatiewet Awgb* (EC Implementation law Equal Treatment Law) Tweede Kamer, 2002-2003, 28 770, nos. 1-3 at page 20, where it is mentioned in the Appendix, at page 20, that the implementation of Article 13 of the Racial Equality Directive has already been completed because of the existence in the Netherlands of the ETC (*EG Implementatiewet Awgb*: Law of 21 February 2004, *Staatsblad 2004*, 119).

[298] Decree on the Legal position of the Netherlands Institute for Human Rights (*Besluit van 28 augustus 2012, houdende regels over de rechtspositie van de leden van het College voor de rechten van de mens en de tot het bureau behorende ambtenaren* (*Besluit rechtspositie College voor de rechten van de mens*)), *Staatsblad 2012*, 389.

[299] Decree working method investigation equal treatment (*Besluit van 31 augustus 2012, houdende nadere regels over de werkwijze van de afdeling, bedoeld in hoofdstuk 2 van de Wet College voor de rechten van de mens* (*Besluit werkwijze onderzoek gelijke behandeling*), *Staatsblad 2012*, 394.

[300] Principles relating to the Status of National Institutions Adopted by UN General Assembly resolution 48/134 of 20 December 1993.

discrimination complaints is perceived as being high-quality and authoritative *('kwalitatief hoogstaand en daarmee gezaghebbend'*).[301]

Secondly, there are the Anti-Discrimination Facilities (*Anti-discriminatievoorzieningen*, ADVs) at local level.[302] The ADVs have a legal basis in the Act on Local Anti-Discrimination Facilities (*Wet gemeentelijke antidiscriminatievoorzieningen).*[303] All 390 municipalities are obliged to establish and subsidise an ADV and receive an amount of money per resident for this purpose. The main task of the ADVs is to assist victims of discrimination and to monitor the situation in this regard.[304] The ADVs and the NIHR thus fulfil different tasks that are closely related but not overlapping.

In the following the main focus is on the NIHR as the primary designated equality body, unless otherwise indicated.

b) Political, economic and social context of the designated body

Overall there is political support for the NIHR, which is not to say that all political parties have a positive attitude to it. Right-wing and populist parties are overall (much) less positive than parties towards the other end of the political spectrum. This is particularly the case where the NIHR gives opinions in controversial discrimination cases that support the complainant.[305]

Financially speaking, after an initial increase in terms of budget and staff for the NIHR compared to the resources allocated to the former ETC, in 2015 the budget for the NIHR was back to the level that was allocated to the former ETC, due to the overall budget cuts during the economic crisis.[306] The NIHR has received additional funding to monitor the implementation of the CRPD since its ratification in 2016.

Similar to the political debate mentioned above, the popular debate surrounding equality and diversity is also mixed. Yet stakeholders and experts are positive overall about the functioning of the NIHR.[307]

c) Institutional architecture

In the Netherlands, the designated body forms part of a body with multiple mandates.

---

[301] *Evaluatie Wet College voor de rechten van de mens* (Evaluation of the National Institute of Human Rights Act), *Tweede Kamer* 2017-2018, 34 338 no. 3, p. 2.

[302] The ADVs were designated as equality bodies in the Explanatory Memorandum to the Act on Local Anti-discrimination Bureaux; Tweede Kamer, 2007-2008, 31 439, no. 3, p. 7. The term 'bureaux' is used interchangeably with 'facilities' (*voorzieningen)*.

[303] Act on Local Anti-Discrimination Facilities (*Wet gemeentelijke antidiscriminatievoorzieningen*), *Staatsblad* 2009, 313. On the basis of this law, a Decree was adopted in which more detailed regulation of the local ADVs is laid down. It contains provisions concerning the independence, competency and procedures which must be followed when the ADVs provide information and assist victims of discrimination (see *Besluit gemeentelijke antidiscriminatievoorzieningen*, *Staatsblad 2009*, 373, *Besluit gemeentelijke antidiscriminatievoorzieningen*).

[304] The ADVs also work together within an overarching association called the National Association against Discrimination (*Landelijke Vereniging tegen Discriminatie*) and are supported by the expert institute, Art.1, named after the constitutional non-discrimination provision. The ADVs and Art.1 cover all of the Article 19 TFEU non-discrimination grounds and were officially recognised as equality bodies (in terms of Article 13 of the Racial Equality Directive) in 2004, see Tweede Kamer, 2003-2004, 28 770, no. 5.

[305] See, for example, the newspaper article of 26 November 2017, 'College voor de Rechten van de mens ligt steeds weer onder vuur' ('The NIHR comes time and again under attack'): www.ad.nl/politiek/college-voor-de-rechten-van-de-mens-ligt-steeds-weer-onder-vuur~aabb31cd/.

[306] See the financial evaluation of the NIHR of November 2015, Tweede Kamer, 2015-2016, 34 338, no.1 attachment 2015D43169.

[307] See the financial evaluation of the NIHR of November 2015, Tweede Kamer, 2015-2016, 34 338, no.1 attachment 2015D43169, p.2. The evaluation report mentions more specifically that experts are positive regarding the priorities set by the NIHR and their implementation. They are somewhat more critical regarding the NIHR's tasks concerning human rights education and providing information.

As mentioned, the competence and functions of the former ETC are now included in the much broader mandate of the NIHR as the national human rights institution that complies with the Paris Principles. This mandate includes the following tasks:[308]

1. Opinions: giving opinions in cases relating to discrimination on the basis of equality legislation.
2. Research: carrying out and stimulating research into the protection of human rights.
3. Reporting: reporting and making recommendations about the protection of human rights, including the annual report on the human rights situation in the Netherlands, to the Government and Parliament.
4. Advice: advising the Government, Parliament or administrative bodies about laws and regulations which relate directly or indirectly to human rights, either in response to a written request or proactively.
5. Information provision: providing information about human rights.
6. Education: stimulating and coordinating education about human rights.
7. Collaboration: structured collaboration with social organisations and national, European and other international institutions.
8. Encouragement: encouraging the ratification and implementation of and compliance with international conventions on human rights and the removal of reservations in such conventions. Encouraging the implementation of and compliance with binding decisions by organisations under international law about human rights and encouraging compliance with European or international recommendations about human rights.
9. Supervising the implementation of the CRPD.

To deal efficiently with the large number of cases handled under the quasi-judicial complaints procedure, the equality and non-discrimination mandate is executed by a specific department of the NIHR, under the responsibility of one of its two vice-presidents.[309] As all commissioners are collectively responsible for carrying out the broad mandate of the NIHR, none of them deal exclusively with the equality and non-discrimination mandate, though some spend more time on this part of the work of the NIHR than others, as more complex cases may require specialised knowledge. The same holds true for most staff members. The budget does not set apart a specified percentage of resources and budget for the equality mandate.

The integration of the equality mandate of the former ETC into the much broader human rights mandate of the NIHR has inevitably led to a relative reduction in attention to the equality mandate in the work of the NIHR, but in the first overall evaluation of the NIHR that became available in 2018 it is concluded that the NIHR has found 'a good balance' between both mandates.[310] In terms of resources, by making the process of handling discrimination complaints more efficient the NIHR has been able to considerably reduce resources spent on its equality mandate without compromising the overall quality of its work in this area. A positive consequence of the broader mandate regards the improved possibilities of linking equality and other human rights issues and thus addressing the wider context which often contributes to discriminatory attitudes and practices. In addition, the NIHR included 'discrimination and stereotyping in the labour market' as one of its four priority themes in its strategic plan 2015-2019.[311] Since 2016 it has also devoted specific attention to its equality mandate by publishing a separate annual report, 'Discrimination

[308] As specified in the Annual Report 2018, p. 9, see https://mensenrechten.nl/nl/publicatie/5caf4b8be19c2154958b119c. The listing reflects the mandate of the NIHR laid down in Article 3 NIHR Act.

[309] The organisation of the NIHR consists of three departments: Front office & case opinions; Studies, recommendations and communications; Operations staff department.

[310] *Evaluatie Wet College voor de rechten van de mens* (Evaluation of the National Institute of Human Rights Act), *Tweede Kamer* 2017-2018, 34 338 no. 3, p. 3.

[311] The other themes relate to topics that also include equality and non-discrimination issues: human rights education, human rights at a local level and monitoring of the CRPD, see Annual Report 2016, now available in English on the website of the NIHR: https://mensenrechten.nl/nl/publicatie/38213.

cases monitor', in which it analyses its work under its equality mandate in more detail than is allowed for in the annual report.[312]

All in all, the level of specific visibility of the equality mandate is significantly reduced by the establishment of the broader mandate of the NIHR, as the institute now addresses all kinds of human rights issues. At the same time, the opinions of the NIHR in discrimination cases still receive quite a lot of attention in the media, in particular when they tie in to political and public controversies and discussions.

d) Status of the designated body/bodies – general independence

i) Status of the body

The NIHR is an independent quasi-judicial body whose status is regulated in the NIHR Act. For further details on its independence see below under ii. It currently consists of ten members and six substitute members.[313] There is also an Advisory Council, which advises the NIHR on its (strategic) plans and advises the Minister of Justice and Security on the appointment of members of the NIHR. The Advisory Council consists (*qualitate qua*) of the National Ombudsman, the chair of the Data Protection Agency, the chair of the Council for the Judiciary and a minimum of four and a maximum of eight members drawn from civil society organisations concerned with the protection of one or more human rights, from organisations of employers and employees and from the academic world (Article 15 (2) of the NIHR Act.) Apart from the aforementioned *qualitate qua* members, the members of the Council are appointed by the Minister of Justice and Security, after consultation with the Minister of the Interior and Kingdom Relations, the NIHR, the Ombudsman, the chair of the Data Protection Agency and the chair of the Council for the Judiciary (Article 15 (3)).

The selection and appointment of members of the NIHR is regulated in Article 16 of the NIHR Act. Vacancies are to be published and communicated to relevant organisations working in the field of human rights. In accordance with the NIHR, the Advisory Council makes suggestions to the Minister of Justice and Security, who then makes a recommendation to appoint them by decree for a period of six years. Reappointment is possible (Article 17 (2) NIHR Act).

The NIHR is fully funded by the central government, but it can independently allocate its resources to its various tasks. It also has full power to recruit and manage its own supporting staff. Article 18 of the NIHR Act regulates the position of the staff of the Institute. Staff are appointed by the Institute (represented by the Director). Their employment conditions are similar to those of civil servants in national and local government. The Institute as a whole is the 'competent authority' as stipulated in the Central and Local Government Personnel Act, which means that all matters, such as promotion, dismissal, salary, etc. are decided by the Director of the Institute. In this respect, there is a major difference compared to the situation under the GETA, where staff were appointed by the Ministry of Justice and Security. Members and staff members of the former ETC all automatically became members and staff of the NIHR.

In terms of accountability, the NIHR must publish an annual report with an overview of its investigations, advice and other activities (Article 21 NIHR Act). It must also send this report to the National Ombudsman, the Data Protection Agency and relevant organisations working in the field of human rights. Every five years the NIHR must report on the functioning in practice of the NIHR Act and the relevant non-discrimination legislation. This

[312] The latest available issue is the Discrimination cases monitor 2018 (*Monitor Discriminatiezaken 2018*): https://mensenrechten.nl/nl/publicatie/5caf4b8be19c2154958b119c.

[313] The maximum number of ordinary members is 12; most members are part-time commissioners and have another part-time job elsewhere. The composition of the NIHR is made public at: https://mensenrechten.nl/nl/collegeleden.

report is sent to the Minister of the Interior and Kingdom Relations and subsequently, with the Minister's response, to Parliament (Article 22 NIHR Act).[314]

The status of the local Anti-Discrimination Facilities or ADVs is that of independent non-governmental organisations (NGOs), although they are subsidised by the local authorities. The legal regulation of the local ADVs is set out in a law which came into force in 2009 (the Act on Local Anti-Discrimination Facilities, *Wet gemeentelijke antidiscriminatievoorzieningen*, hereafter ADV Act). The ADVs have two legal tasks: to assist people with discrimination complaints and to record all such claims and bring them to the attention of the Minister of the Interior and Kingdom Relations (Article 2(1) ADV Act).

There is considerable variety in the way ADVs are organised and function, but research suggests that the vast majority of municipalities (86%) are serviced by ADVs that meet the requirements for quality and professionalism. Overall, the larger and regionally organised ADVs perform better in terms of effectiveness than smaller ADVs.[315]

Municipalities are obliged to fund the ADVs, but they do not always actually spend the financial resources they receive for this purpose on these organisations. In many municipalities the economic crisis has resulted in budget cuts also affecting the ADVs. On the other hand, some municipalities devote more resources to the ADVs than required.[316]

ii) Independence of the body

Article 4 of the NIHR Act explicitly stipulates that, 'The Institute is independent in the performance of its duties'. Independence is further guaranteed in several provisions of the NIHR Act. In a number of them, reference is made to the Autonomous Administrative Bodies Framework Act (AABF) (*Kaderwet Zelfstandige Bestuursorganen*),[317] the Advisory Bodies Framework Act (ABFA) (*Kaderwet Adviescolleges*),[318] the Judicial Officers Legal Status Act (*Wet Rechtspositie Rechterlijke Ambtenaren*)[319] and the Act on the Organisation of the Judiciary (*Wet op de Rechterlijke Organisatie*),[320] in which a detailed regulation is given of the status of independence, accountability, incompatibilities etc. of people who work directly or indirectly for the Government. In many respects the members of the NIHR, its Advisory Council and its staff are covered by these laws. In some other respects, these laws are exempted precisely in order to guarantee the independence of the Institute.

In addition, Article 17 of the NIHR Act gives a detailed regulation of the legal status of the members in terms of the duration of their appointment, their working conditions, salary, possibility of disciplinary sanctions and dismissal, etc. To emphasise the independence of the members, subsection 1 states that, apart from a few exceptions, the provisions of the Judicial Officers Legal Status Act concerning dismissal, suspension and disciplinary measures apply *mutatis mutandis* to them.[321] This provision contains a few changes compared to the former Article 16 (4) of the General Equal Treatment Act, all of which are

[314] The first report of this kind became publicly available in 2018 when it was sent to Parliament together with the Government's response, see *Evaluatie Wet College voor de rechten van de mens* (Evaluation of the National Institute of Human Rights Act), *Tweede Kamer* 2017-2018, 34 338 no. 3.

[315] *Onderzoek naar de werking van ADV's in de praktijk* (Report on the functioning of the ADVs in practice), March 2017, p. 51. https://www.tweedekamer.nl/downloads/document?id=fe7b42c6-d0e8-4fb5-9bd0-2ced0b63d28a&title=Onderzoek%20naar%20de%20werking%20van%20de%20adv%E2%80%99s%20in%20de%20praktijk.pdf.

[316] *Onderzoek naar de werking van ADV's in de praktijk* (Report on the functioning of the ADVs in practice), March 2017, p. 48. https://www.tweedekamer.nl/downloads/document?id=fe7b42c6-d0e8-4fb5-9bd0-2ced0b63d28a&title=Onderzoek%20naar%20de%20werking%20van%20de%20adv%E2%80%99s%20in%20de%20praktijk.pdf.

[317] *Staatsblad* 2006, 587, entered into force 1 February 2007.

[318] *Staatsblad* 1996, 378, entered into force 1 January 1997.

[319] *Staatsblad* 1996, 590, entered into force 1 January 1997.

[320] *Staatsblad* 1827, 20, entered into force 1 October 1838.

[321] One important difference with the position of judges is that members of the NIHR are appointed for a period of six years with the possibility of re-appointment, while judges are appointed for life.

intended to emphasise / strengthen the independence of the members of the Institute. The independence is not only formally stipulated in the law but, according to the assessment of the author of this report, is reflected in the realities on the ground.

The ADVs are instated by local government (*colleges van burgemeester en wethouders*), in accordance with Article 1 ADV Act. The Act expressly provides in Article 2(1)(a) that it is the task of the ADVs to provide independent assistance to victims of discrimination. Article 2 of the Decree on the local anti-discrimination facilities (*Besluit gemeentelijke antidiscriminatievoorzieningen*)[322] sets out guarantees to ensure that ADV staff members who treat complaints of discrimination are independent of the local government, for example they may not simultaneously be a member of the local government or be hierarchically inferior to the local government in any other way. The Decree further provides that the ADVs must also be impartial regarding the fulfilment of their tasks and that they must ensure that complaints of discrimination are not treated by staff members who have a personal interest in the case.[323]

In practice the requirements for independence are met by ADVs covering the vast majority of municipalities (86 %).[324]

e) Grounds covered by the designated body/bodies

Under its specific mandate in the field of non-discrimination, the NIHR deals with all the non-discrimination grounds mentioned in the GETA, DDA and ADA, as well as some more specific grounds. Thus it covers race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status, disability, age, plus 'working time' and 'type of labour contract'. In the composition of its members and supporting staff the NIHR strives for sufficient diversity to ensure that relevant expertise regarding all the grounds covered is present.

Because of the broad personal scope of the non-discrimination legislation, anyone residing in the Netherlands, including migrants, can bring a complaint if they are discriminated against on any of the grounds covered.

In its strategic reports, the NIHR indicates its focus areas. So far these include specific non-discrimination themes. In the strategic report for the period 2013-2015 the NIHR identified several themes for a proactive promotion of human rights: care for the elderly and human rights; migration and human rights; discrimination regarding access to the labour market; ratification and implementation of the CRPD; human rights education; and ratification of other treaties relevant for the protection of human rights in the Netherlands.[325] Its strategic report for 2016-2019 singled out four themes or programmes to focus on: human rights education; discrimination and stereotyping in the labour market; human rights at the local level; and monitoring of the implementation of the CRPD. Discrimination in the labour market thus remained prominently on the agenda for this period. The NIHR emphasised the fact that setting priorities for the themes that will receive particular attention in a certain period does not imply that former themes are no longer addressed; in this regard it specifically mentioned refugees and migrants.[326]

---

322 *Staatsblad 2019*, 373.
323 Article 2 (5) and (6) Decree on the local anti-discrimination facilities.
324 A minority of small ADVs are sometimes staffed by employees of the municipality concerned, which conflicts with the requirements of independence. See the report on the functioning of the ADVs in practice (*Onderzoek naar de werking van ADV's in de praktijk*), March 2017, p. 48. https://www.tweedekamer.nl/downloads/document?id=fe7b42c6-d0e8-4fb5-9bd0-2ced0b63d28a&title=Onderzoek%20naar%20de%20werking%20van%20de%20adv%E2%80%99s%20in%20de%20praktijk.pdf.
325 NIHR Strategic plan 2012-2016, available in English: www.mensenrechten.nl/nl/publicatie/35930.
326 NIHR Strategic plan 2016-2019, available in English: www.mensenrechten.nl/nl/publicatie/37005.

All in all, the impression of the author of this report is that the attention paid by the NIHR to all the grounds of discrimination included in its mandate is quite balanced, with disability receiving considerably more attention than previously, in view of the specific task entrusted to the NIHR to monitor the implementation of the CRPD, which was ratified in 2016.

f) Competences of the designated body/bodies – and their independent and effective exercise

i) Independent assistance to victims

In the Netherlands, the NIHR does not have the competence to provide independent assistance to victims. The role of assisting victims is seen as being in conflict with the role of independently investigating individual complaints and giving an authoritative opinion on them. The same applies to the NIHR's official competence to bring cases of unequal treatment to the attention of the courts; even though it has this competence, the NIHR never makes use of it as it would conflict with its own quasi-judicial function.

However, the local ADVs do fulfil this function.[327] The role of these organisations is mainly to assist victims of discrimination and to monitor developments with respect to discrimination in society. They bring many cases of discrimination to the attention of the NIHR and the courts, including in the form of general interest actions or collective actions. They also set up situation testing processes, in order to bring systemic discrimination to light, especially in the area of cafés and nightclubs (see Section 6.2 of this report).[328]

ii) Independent surveys and reports

In the Netherlands, the NIHR has the competence to conduct independent surveys and publish independent reports. It may investigate structural instances of discrimination of its own accord[329] and may advise organisations (including governmental organisations) who want to know whether their policies or practices are in compliance with the law.

The NIHR operates in a fully independent way, both *de jure* and *de facto*.[330] The NIHR and its predecessor have made extensive use of their competence in this regard. They have conducted a large number of surveys and produced reports on a wide variety of equality issues regarding the grounds of discrimination covered by the EU directives and beyond. In 2017, for instance, the NIHR issued reports on equal pay, pregnancy discrimination, access to voting for disabled people and access to public transport for this group. All surveys and reports are published on the website of the NIHR and are often referred to in policy documents.[331]

Interestingly, the NIHR Act provides that the Minister concerned must give the NIHR the opportunity to discuss its surveys, reports, recommendations or advice with him/her (Article 8 NIHR).

---

[327] Article 2(1)(a) Act on Local Anti-Discrimination Facilities. The expert centre Art. 1 may also support victims.

[328] The national expert centre Art.1 supports the work of the local ADVs by, for example, offering training to employees working for the local ADVs. Art.1 mainly has a role in monitoring developments in society with regard to (non-) discrimination and bringing instances of (structural) discrimination to the attention of the general public and politicians. The grounds covered are religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status, disability and age.

[329] The scope for this was extended by the GETA Evaluation Act or *Evaluatiewet AWGB* (*Wet tot wijziging van de Algemene Wet Gelijke Behandeling; Evaluatiewet Awgb*) of 15 September 2005, *Staatsblad 2005*, 516. (This is the law which amended the GETA on the basis of proposals stemming from the first evaluation of the Act during the period 1994-1999).

[330] This conclusion is corroborated by the fact that the independence of the NIHR does not figure as an issue in the financial evaluation of the NIHR of November 2015, Tweede Kamer, 2015-2016, 34 338, no.1 attachment 2015D43169.

[331] www.mensenrechten.nl/nl/publicaties.

The NIHR also sends its own, independent reports on the human rights situation in the Netherlands to the UN human rights treaty bodies for consideration in the context of the reporting procedures.

Other organisations also publish very informative reports about the prevalence and causes of discrimination. The main (publicly funded) research institution in this regard is the Netherlands Institute for Social Research (*Sociaal Cultureel Planbureau, SCP*). In 2013, an SCP study revealed that harassment at work is one of the greatest problems encountered by LGBT people,[332] followed in 2015 by a report on labour market discrimination in The Hague.[333] The SCP also publishes reports on the way people perceive.[334]

The ADVs do not have competence to conduct independent surveys and publish reports.

iii) Recommendations

In the Netherlands, the NIHR has the competence to make recommendations on discrimination issues.[335] In respect of this competence the NIHR also operates independently both *de jure* and *de facto*. Under the NIHR Act it has the competence to advise the Government, Parliament or administrative bodies about all laws and regulations directly or indirectly related to human rights issues, either in response to a request or on its own initiative (Article 5). The NIHR makes use of its advisory competence on a regular basis by formulating recommendations in its reports or providing advice in response to specific issues.[336]

The ADVs do not have competence to issue recommendations.

iv) Other competences

Other competences and tasks of the NIHR include its quasi-judicial role in relation to discrimination complaints (see below for more details); provision of information and education on human rights; and collaboration with social organisations and national, European and other international institutions working in the area of human rights. Another particular task concerns encouraging the implementation of and compliance with international conventions on human rights and with European or international recommendations on human rights (Article 3(h) NIHR).

g) Legal standing of the designated body/bodies

In the Netherlands, the NIHR has legal standing to bring discrimination complaints on behalf of identified victim(s) and *ex officio* to court. It can also intervene in legal cases concerning discrimination. Although the NIHR has this competence (in Article 13 NIHR Act), it never makes use of it because it conflicts with its main task of investigating individual complaints about discrimination in a neutral and objective manner.[337]

---

[332] See the SCP Report, *Seksuele oriëntatie en werk. Ervaringen van lesbische, homoseksuele, biseksuele en heteroseksuele werknemers* (Sexual orientation and work. Experiences of lesbian, gay, bisexual and heterosexual employees). In December 2013, the Minister of Education, Culture and Science sent a letter to Parliament on the topic of discrimination against LGBT employees, see Tweede Kamer, 2013-2014, 30 420, no. 204.

[333] SCP 2015, Op Afkomst Afgewezen (Rejected due to origin): https://www.scp.nl/publicaties/publicaties/2015/06/17/op-afkomst-afgewezen.

[334] For the latest report see SCP 2020, *Ervaren Discriminatie in Nederland* (Experience of discrimination in the Netherlands), available at: https://www.scp.nl/publicaties/publicaties/2020/04/02/ervaren-discriminatie-in-nederland-ii.

[335] For an overview of the many recommendations it issues, see the website of the NIHR, e.g. under the category 'adviezen' ('advice'): www.mensenrechten.nl/nl/publicaties. Recommendations are also included in its research reports and annual reports, also available on the website.

[336] For an example of a recommendation issued following an individual complaint see Opinion 2019-45.

[337] In 2016 the NIHR intervened for the first time as a third party in proceedings at the European Court of Human Rights through an *amicus curiae* submission, but this was not in a non-discrimination case.

The expert centre Art.1 and the local ADVs can bring claims to court within the framework of the general rules that exist under Dutch civil law concerning actions on behalf of victims and general interest actions or collective actions. (No data on numbers of class actions are available.) See Section 6.2 of this report.

h) Quasi-judicial competences

In the Netherlands, the NIHR is a quasi-judicial institution (Articles 3 (a) and 10 NIHR Act). Its decisions and recommendations are not binding and it does not have the power to impose sanctions. No appeal is possible in relation to the opinions of the NIHR itself, but a case can be brought to a (civil or administrative) court in order to obtain a binding judgment. On the basis of an Opinion of the NIHR in which a certain practice or conduct has been declared discriminatory, a defendant (or their organisation) may also take voluntary measures to put an end to the discrimination or take action to prevent it from happening in the future.

The NIHR keeps track of the follow-up to its opinions and reports on this in its annual reports and in particular in its more detailed annual 'Discrimination cases monitor'.[338]

According to the NIHR's reports for the years 2014, 2015, 2016, 2017 and 2018, in 12 %, 11 %, 12 %, 6 % and 12 % respectively of cases an individual measure was taken by the defendant / company or institution, in 35 %, 39 %, 35 %, 50 % and 32 % respectively a structural measure was taken and in 36 %, 31 %, 26 %, 31 % and 33 % both an individual and a structural measure were taken. Measures were taken in 83 %, 81 %, 73 %, 87 % and 7 % of all cases as a result of the Opinion or recommendation.[339]

The local ADVs are not a (quasi) judicial institution. They do not hear complaints, but they may assist victims to bring complaints before the NIHR or the courts.

i) Registration by the body/bodies of complaints and decisions

In the Netherlands, the NIHR registers the number of complaints of discrimination and decisions (by ground, field, type of discrimination, etc.). These data are easily available to the public on the NIHR website.

The tables below show the number of requests for ETC/NIHR Opinions and the number of Opinions issues. At the time of writing this report the figures over 2019 were not yet available.

[338] The most recent one covers 2018, see *Monitor Discriminatiezaken 2018:* https://mensenrechten.nl/nl/publicatie/5caf4b8be19c2154958b119c.

[339] (*Monitor Discriminatiezaken 2018 – Tabellen* (Discrimination cases monitor 2018 – Tables), p. 19, available at: https://mensenrechten.nl/nl/publicatie/5caf4b8be19c2154958b119.

Number of requests for an ETC/NIHR Opinion:[340]	
Year:	*Number of requests:*
2010	423
2011	719
2012	634
2013	498
2014	463
2015	422
2016	463
2017	416
2018	510[341]

In 2018 the majority of requests for an opinion related to discrimination on grounds of disability and chronic illness (25 %) and sex (20 %), followed by race (18 %), age (15 %) and nationality (7 %).[342] Many requests do not result in an opinion, they may be declared inadmissible, closed or withdrawn by the claimant (sometimes after an agreement has been reached).[343]

Number of opinions												
	2013		2014		2015		2016		2017		2018	
	N	%	N	%	N	%	N	%	N	%	N	%
Sex	40	22	43	24	23	15	30	20	32	20	41	28
Race	27	15	28	16	30	19	34	23	32	20	28	19
Nationality	14	8	11	6	6	4	7	5	4	2	2	1
Religion	18	10	18	10	12	8	13	9	8	5	9	6
Sexual orientation	0	0	7	4	4	3	1	1	1	1	1	1
Civil status	2	1	0	0	0	0	0	0	0	0	1	1
Political beliefs	3	2	0	0	0	0	0	0	3	2	2	1
Philosophy of life	0	0	0	0	0	0	1	1	0	0	0	0
Part-time / full-time	5	3	3	2	0	0	1	1	2	1	2	1
Temp/perm. Employment	0	0	0	0	0	0	0	0	0	0	0	0
Disability/chronic illness	31	17	26	14	28	18	27	18	49	30	51	34
Age	32	17	31	17	32	21	25	17	41	25	22	15
Total number of opinions:	**183**		**179**		**155**		**151**		**161**		**149**	

[340] Discrimination cases monitor 2018 – Tables, p. 6. See the NIHR website, where all the annual reports are published, including case monitors and tables: www.mensenrechten.nl/nl/publicaties. As shown in the table below this text ('Numbers of opinions given by the ETC/NIHR'), only a minority of all requests result in an Opinion from the NIHR. Others are not admissible (outside the scope of the legislation) or are manifestly ill-founded. Furthermore, some people just want information and do not want to submit a formal complaint.

[341] According to the NIHR, in 2018 there was an increase of complaints from Travellers, probably following the policy change on Traveller sites (https://mensenrechten.nl/nl/discriminatiemonitor).
Discrimination cases monitor 2018 – Tables (*Monitor Discriminatiezaken 2018 – Tabellen*), p. 6, available on the website of the NIHR: https://mensenrechten.nl/nl/publicatie/5caf4b8be19c2154958b119c.

[343] Discrimination cases monitor 2018 – Tables (see previous footnote), p. 15.

j) Stakeholder engagement

The NIHR engages with a wide variety of stakeholders, including civil society associations, business/employer/service provider networks and organisations, public bodies, local government entities, trade unions or employee's associations, ADVs and academics. Thus, for instance, the members of the NIHR regularly participate in and/or visit all sorts of activities and events organised by these stakeholders. The NIHR Act also specifically provides that the Advisory Council is composed of members from a variety of such backgrounds, thus guaranteeing some level of institutional engagement with stakeholders. The Advisory Council consists (*qualitate qua*) of the National Ombudsman, the chair of the Data Protection Agency, the chair of the Council for the Judiciary and a minimum of four and a maximum of eight members drawn from civil society organisations concerned with the protection of one or more human rights, from organisations of employers and employees and from the academic world (Article 15 (2) of the NIHR Act). In the absence of relevant research, it is hard to assess how intensive engagements with each of these stakeholders are in practice.

k) Roma and Travellers

The NIHR does not treat Roma and Travellers as a specific priority issue. A possible explanation could be that the social situation of Roma and Travellers in the Netherlands may not be so precarious (compared to other European countries) that it demands priority treatment. This is not to say Roma are not on the agenda of the NIHR. In recent years quite a number of successful complaints regarding housing (lack of trailer facilities) have been brought to the NIHR. In its opinions the NIHR has consistently held that the 'extinction policy' pursued by many municipalities constitutes discrimination on grounds of race and violates the GETA (see above, Section 3.2.10). In 2018 the NIHR issued an advice to the Minister of the Interior and Kingdom Relations concerning trailer facilities for Travellers.[344]

Roma, Sinti and Travellers are not specifically mentioned in overviews of discrimination complaints by the ADVs.

[344] *Advies aan minister van Binnenlandse Zaken en Koninkrijksrelaties inzake Woonwagen- en standplaatsenbeleid*, 28 March 2018, available at: https://mensenrechten.nl/nl/publicatie/5b46fcdf748c2212a54517da.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The equality bodies described in Section 7 (the local ADVs and the NIHR) play a core role in the dissemination of information about legal protection against discrimination. They have been provided with a specific legal mandate to do so.

b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

The Ministry of the Interior and Kingdom Relations (Department of Constitutional Affairs) co-ordinates all activities in the area of EU law implementation issues, since all equal treatment legislation is (also) seen as part of the general principle of equality and non-discrimination included in Article 1 of the Constitution. In this capacity and in cooperation with other ministries it often draws on the work and activities of NGOs. The NIHR also plays an important role in encouraging dialogue with NGOs with a view to promoting the principle of equal treatment.

c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

The Ministry of Social Affairs and Employment is responsible for activities to enhance compliance with the equal treatment legislation, as far as this legislation applies to employment relationships. This Ministry has taken the initiative for a variety of activities to inform the general public about the (new) legal standards, to inform social partners and to stimulate their involvement in the implementation of the legal non-discrimination norms. In addition, the Ministry is actively engaged in promoting studies and surveys in this field.

d) Addressing the situation of Roma and Travellers

No official body or agency exists that is specifically appointed to address Roma and Traveller issues at national level. However, in 2009-2010 the Government initiated co-ordination, mutual support and exchange of information between local authorities in which a substantial number of Roma people live.[345] A set of policy measures was drafted by the Dutch Government in 2011 to foster the social inclusion of Roma and Sinti people, as requested by the European Commission. In addition, the Dutch Government developed a qualitative monitoring instrument to measure the social inclusion of Roma and Sinti in the Netherlands. This instrument includes indicators such as education, employment, healthcare, housing and dialogue with local authorities. This monitor is updated every few years. From the latest report it appears that the social integration of Roma is still very problematic.[346]

[345] See Tweede Kamer, 2008-2009, 31 700 XVIII, no. 90.

[346] See *Monitor Sociale Inclusie: meting 3. Tweede vervolgmeting naar de woon- en leefomstandigheden van Roma en Sinti in Nederland* (Monitor on social inclusion: measurement 3. Second follow-up measurement of the housing and living situation of Roma and Sinti in the Netherlands), 2018: www.rijksoverheid.nl/documenten/publicaties/2018/11/16/monitor-sociale-inclusie-meting-3.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16 (a))

To the author's knowledge there are no laws, regulations or administrative provisions in the Netherlands that are contrary to the principle of equal treatment, although this cannot be said with certainty where (potential) indirect discrimination could be concerned.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

Article 9 GETA, Article 13 ADA and Article 11 DDA stipulate that 'agreements' (*bedingen*) which are in contravention of the equal treatment legislation shall be null and void. This also concerns collective agreements. The author of this report is not aware of any cases where agreements have been challenged on this ground.

9 COORDINATION AT NATIONAL LEVEL

For various (legislative) procedures and the development of policies, frequent co-operation exists between the Ministries of the Interior and Kingdom Relations; Social Affairs and Employment; Education, Culture and Science; Health, Welfare and Sport; and Justice and Security. For some specific projects other ministries may be involved. The division of tasks is organised in the following way:

1. Equal treatment in employment: (inter alia: GETA, ADA, DDA and Equal Treatment Act Men/Women): Ministry of Social Affairs and Employment.
2. Age discrimination in employment: Ministry of Social Affairs and Employment.
3. General policies against racism: Ministry of Social Affairs and Employment.
4. Disability discrimination: Ministry of Health, Welfare and Sport.
5. General Equal Treatment Act, Constitutional provisions, general coordination of anti-discrimination policies: Ministry of the Interior and Kingdom Relations.
6. Criminal law provisions regarding discrimination, anti-discrimination policies for the police/public prosecution: Ministry of Justice and Security.
7. Emancipation policies for women and LGBT people: Ministry of Education, Culture and Science.[347]

The Ministry of the Interior and Kingdom Relations co-ordinates all the legislative activities because it is responsible for the implementation of the Constitution, which in Article 1 contains a general non-discrimination provision.

The anti-discrimination policies are also coordinated by the Ministry of the Interior and Kingdom Relations. The Ministry is responsible for municipal anti-discrimination services.

The latest National Action Programme against Discrimination was published in January 2016.[348] Basically, this action programme brings together under a single umbrella various existing programmes and plans to combat discrimination and exclusion, such as the programmes mentioned above. It thus seeks: to achieve a better overall view and strategy across all grounds of discrimination, including but not limited to those covered by the EU directives; to create more synergy; and to improve cooperation between all the stakeholders involved.

With this programme the Government intends to respond to the current social context characterised by increasing tensions between 'various groups', as it is formulated, which calls for a clear message from the Government to combat exclusion and discrimination and improve cohesion. Which groups are meant is not specified.[349] The programme identifies four main starting points: prevention and awareness-raising to promote an inclusive society, including the promotion of diversity in the labour market and combating stereotypes; strengthening cooperation and infrastructure to combat discrimination; paying more attention to policies and action at the local level; and supporting policies and actions through interdisciplinary knowledge and research on the causes of discrimination and the effectiveness of interventions.

---

[347] Emancipation is not defined, but in recent periods emphasis has been placed on promoting the norms and values of gender equality and LGBTI rights, including for women a focus on economic independence, 'women to the top' and a socially safe environment, and for LGBTI people social acceptance, in particular in bicultural and religious communities. See Minister of Education, Culture and Science, 20 January 2017, *Opbrengsten Emancipatiebeleid 2013-2017* ('Results of Emancipation policy 2013-2017): http://www.vrouwenbelangen.nl/cms/wp-content/uploads/2013/01/kamerbrief-over-opbrengsten-emancipatiebeleid-2013-2017-1.pdf.

[348] *Nationaal Actieprogramma tegen discriminatie* (National action programme against discrimination), Tweede Kamer, 2015-2016, 30 950, no. 84.

[349] *Nationaal Actieprogramma tegen discriminatie* (National action programme against discrimination), Tweede Kamer, 2015-2016, 30 950, no. 84.

The Government informs parliament regularly about its activities in the field of eradicating discrimination. In 2019 it did not publish a separate progress report on the National Action Programme against Discrimination. However, it did send an update on the Cabinet's approach to discrimination, indicating several focus areas and measures being taken.[350] These included several programmes in the field of employment, including for people with a migration background and for students seeking internships. It was also mentioned that the Discrimination Guideline (*Aanwijzing discriminatie*) for the public prosecutor had been revised, inter alia, to clarify when a common offence is deemed to have a discriminatory motive. The Government further reported on its efforts to strengthen the Local Anti-Discrimination Facilities.

In addition to the general national action plan against discrimination, a comprehensive action plan against labour market discrimination has been in place since 2014, targeting discrimination on the grounds of age, disability, race/ethnic origin, sex and sexual orientation.[351] The plan comprised dozens of measures, ranging from pre-existing Government policies and already proposed legislative changes to new policy proposals. In 2018 a new action plan was published for the period 2018-2021.[352] This plan focuses on combating discrimination in recruitment and selection processes, but also addresses the pay gap and pregnancy discrimination. The Minister of Social Affairs and Employment reports regularly to parliament on the implementation of the action plan. The latest report dates from 11 July 2019.[353]

Action plans and programmes also exist for discrimination related to specific grounds, such as the *Programma Onbeperkt Meedoen!* (disability) and the Action Plan on Safety for LGBTI people (*Actieplan Veiligheid LHBTI's*).

[350] Tweede Kamer 2018 / 2019, 30 950, no. 161.
[351] Tweede Kamer, 2013-2014, 29 544, no. 523.
[352] Tweede Kamer 2017 / 2018, 29 544, no. 834.
[353] Tweede Kamer 2018 / 2019, 29 544, no. 923.

10 CURRENT BEST PRACTICES

- The functioning of the NIHR in its first five years. The evaluation of the period 2012-2017 is overall positive and concludes that:
  - the integration of the former Equal Treatment Commission into the NIHR did not have detrimental effects; the NIHR has found a good balance between its equality mandate and its broader human rights mandate;
  - its semi-judicial role regarding discrimination complaints is perceived as being high-quality and authoritative (see Section 7 a) and 7 c) above).[354]

- Concerted efforts by several actors (the NIHR, Ombudsman, public interest litigation organisations and the EU Commission) resulted in a policy change regarding Roma housing. The new housing policy framework for Roma, Sinti and Travellers is directed at preventing discrimination against Roma, ensuring their cultural rights and providing legal security in the area of housing. Most importantly, municipalities are no longer allowed to pursue an 'extinction policy' regarding trailer sites (see Section 3.2.10 under a)).[355]

- Integration of anti-discrimination programmes developed by various ministries, including annual monitoring, to enhance their effectiveness (see Section 9).[356]

[354] *Evaluatie Wet College voor de rechten van de mens* (Evaluation of the National Institute of Human Rights Act), *Tweede Kamer* 2017-2018, 34 338 no. 3, p. 2-3.

[355] *Beleidskader Gemeentelijk woonwagen- en standplaatsenbeleid* (Policy framework on municipal trailer and campsite policy): www.rijksoverheid.nl/documenten/rapporten/2018/07/02/beleidskader-gemeentelijk-woonwagen-en-standplaatsenbeleid.

[356] Minister of the Interior and Kingdom Relations, 26 April 2018, *Kamerbrief inzake kabinetsaanpak en voortgangsrapportage over het Nationaal actieprogramma tegen discriminatie* (Letter to Parliament regarding the Cabinet's approach to and progress report on the National Action Programme against Discrimination): www.rijksoverheid.nl/documenten/kamerstukken/2018/04/26/kamerbrief-inzake-kabinetsaanpak-en-voortgangsrapportage-over-het-nationaal-actieprogramma-tegen-discriminatie.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

- The accumulative conditions in the 'harassment' definition may be considered to fall short of the directives' 'non-regression' clause (see Section 2.4 of the report).
- Arguably, the Dutch Government interprets the prohibition of an 'instruction to make a distinction' unduly narrowly, including in relation to the 'scope of liability' for this type of discrimination (see Section 2.5 of the report).
- Both Article 2(5) and Article 7(2) of the Employment Framework Directive talk about national legislation or measures taken by the Member States' governments in order to protect health and safety. Article 3(1)(a) of the DDA provides for a justification on this ground, but it is disputable whether this provision is in line with the requirements of the directive (see Section 4.6 of the report).

11.2 Other issues of concern

- The main, more general issue of concern relates to the increasing tensions in Dutch society between various minority and majority groups which seem to exacerbate exclusion and discrimination, in particular in relation to race/ethnic origin and migration background. There are at present two political parties represented in the Dutch Parliament with openly xenophobic agendas Together they hold 22 out of 150 seats in the Lower House and 15 out of 75 seats in the Senate.
- The principal issue of concern with regard to the implementation and practical application of the anti-discrimination directives at national level is the gap between the law in the books and realities on the ground. Overall Dutch legislation to combat discrimination is up to European and international standards, but the prevalence of discrimination is still of grave concern.
- The partially reversed burden of proof is not applicable in case of victimisation claims, which falls short of EU requirements (see Section 6.4 of the report).
- The requirement that sanctions need to be 'effective', 'dissuasive' and 'proportionate' seems not to be met by the Dutch legislation (see Section 6.5 of the report).
- At some points the equal treatment law has been worded in such a way that a rather wide interpretation of the provision is possible, leaving, for example, more room for justifications than would seem appropriate, considering the general rule of the CJEU that exceptions to the non-discrimination principle should be interpreted restrictively. For example, Article 7 ADA concerning exemptions to the prohibition of age discrimination allows for specific measures for 'designated age categories', whereas the Directive expressly mentions the examples of young people, older workers and persons with caring responsibilities. However, the Dutch NIHR and the courts do seem to follow the CJEU in this regard, so in practice this is not really problematic.

12 LATEST DEVELOPMENTS IN 2019

12.1 Legislative amendments

- A provision was added to the GETA specifying that the ground 'sex' covers gender characteristics, gender identity and gender expression.[357]
- The legal provision on collective action in civil proceedings (Article 3:305a Civil Code) has been amended, resulting in a significant increase in the requirements to be met by foundations or associations seeking to engage in proceedings in discrimination cases, either on behalf of victims or in the general interest. At the same time, it has become possible for these foundations or associations to claim pecuniary damages on behalf of victims of discrimination (see Section 6.2).[358]

12.2 Case law

Name of the court: Supreme Court
Date of decision: 19 April 2019
Reference number: ECLI:NL:HR:2019:647
Link: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2019:647
Brief summary: Age discrimination in employment. The case concerned the calculation of redundancy payments to employees who were dismissed after a reorganisation. The calculation was based on the expected retirement age of the employee, which was set at 62 for employees born between 1950 and 1952 and at 65 for those born after 1952, resulting in lower redundancy payments for the first group of employees. The different age limits were due to the existence of an early pension scheme for employees born between 1950 and 1952. The difference in treatment was considered justified by the lower courts, however the Supreme Court found that the justification test applied by those courts did not meet the requirements set by the CJEU. According to the Supreme Court, the lower courts should have looked more closely into the subsidiarity and proportionality of the measure. The judgment thus intensifies the standards for the justification of age discrimination under Article 7(1)(c) ADA. The Supreme Court referred the case back to the Court of Appeal to conduct a new proportionality assessment.

Name of the court: Supreme Court
Date of decision: 20 December 2019
Reference number: ECLI:NL:HR:2019:2037
Link: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2019:2037
Brief summary: Age discrimination in employment. Like the previous case, this judgment concerns the requirements of the justification test in cases of age discrimination. The ABP, the Dutch pensions fund for public servants, restricted the accrual of pensions for employees of 62 years and over in receipt of redundancy payments. Article 7(1)(c) ADA states that differences in treatment on the ground of age are allowed if they are based on an objective justification. The Supreme Court specifies in the present judgment that the requirement of an objective justification does not always compel the defendant to submit calculations or numerical evidence; this depends on the aim of the difference in treatment and the arguments invoked by the parties. This standard is more lenient than that formulated in earlier case law, which suggested that calculations or numerical evidence must always be submitted. The Supreme Court found that the ABP had not discriminated against the applicants on the ground of their age.

Name of the court: Administrative Jurisdiction Division of the Council of State
Date of decision: 12 June 2019
Reference number: ECLI:NL:RVS:2019:1885

---

[357] Act on the clarification of the legal status of transgender and intersex persons (*Wet verduidelijking rechtspositie transgender personen en intersekse personen*), *Staatsblad 2019*, 302.
[358] Act on the settlement of damages in collective action cases (*Wet afwikkeling massaschade in collectieve actie*), *Staatsblad 2019*, 130. The Act entered into force on 1 January 2020.

Link: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2019:1885
Brief summary: No discrimination on the ground of religion in education. A secondary school did not allow a Sikh student to wear his kirpan (religious dagger) inside the school. The Administrative Jurisdiction Division considered that this prohibition was objectively justified in light of the school's responsibility to ensure a safe environment and the overall social pressure on school boards to prevent violence within schools. No violation of Article 1 Dutch Constitution or Article 7 GETA.

Name of the court: Central Appeals Tribunal
Date of decision: 6 August 2019
Reference number: ECLI:NL:CRVB:2019:2611
Link: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2019:2611
Brief summary: No discrimination on the ground of national origin in social assistance. The applicant's social assistance allowance was terminated after it became known to the local authorities that she owned property in Turkey, which was her country of origin. The information was gathered by the local authorities through an investigation which focused on beneficiaries selected through the following criteria: a) country of origin (Turkey), b) date of birth (before 1981) and c) holiday patterns. The applicant claimed that the focus on beneficiaries of Turkish national origin violated the prohibition of discrimination in Article 14 ECHR. Earlier case law of the Central Appeals Tribunal had established it was discriminatory to restrict investigations to beneficiaries of a particular national origin. However, in this case the Central Appeals Tribunal accepted that the investigation in Turkey formed part of a larger investigation in which beneficiaries from different countries of origin were selected in phases. It was established that other countries of origin had also been targeted, including Belgium, Spain, Germany, Morocco, Poland and the Dutch Antilles. Moreover beneficiaries originally from the Netherlands had also been subjected to investigations regarding undeclared capital. The Tribunal therefore established that the applicant had not suffered discrimination. The same judgment was issued in several other cases published on the same date and was confirmed in another judgment a few months later (Central Appeals Tribunal 8 October 2019, ECLI:NL:CRVB:2019:3296).

Name of the court: District Court Central Netherlands (Rechtbank Midden-Nederland)
Date of decision: 24 December 2019
Reference number: ECLI:NL:RBMNE:2019:6305
Link: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2019:6305
Brief summary: Discrimination on the grounds of disability, access to goods and services. Remedies. This judgment follows up on Opinion 2017-104 of the NIHR. A blind, transgender woman wished to shop at a drugstore and asked to be taken by the arm and guided through the shop so she could browse and select products herself. In its 2017 Opinion the NIHR held that the shop's refusal to support the woman as she wished violated the duty to provide reasonable accommodation. She then requested the (civil) district court to a) order the shop to guide her through the store at least once a week and b) award compensation for non-material damages.

The district court noted that, before the issue arose, employees of the shop had for several years agreed to guide the woman through the shop as she had requested. They had eventually stopped doing this because of issues relating to the woman's personal hygiene and behaviour, but without informing her of these reasons. The court found no evidence that the refusal to continue to accommodate the woman as she wished was related to her disability or to her transition. However, it held that the shop managers should have informed the woman about the reasons for discontinuing the reasonable accommodation and that they should have communicated with her to search for suitable alternatives, including by asking her why she attached importance to being guided through the shop instead of having products brought to her from a shopping list. The court therefore found that the shop managers had acted in contravention of the DDA. It did not give the requested injunction because the woman had in the meantime indicated that she no longer wished to shop at the store, although the store manager was prepared to resume the

accommodation provided earlier. No compensation was awarded because the court considered that the conduct of the shop managers and employees had not been such as to result in non-material damages – the court mentioned in this regard that the shop had for several years provided reasonable accommodation and that there was no reason to believe that their refusal to continue doing so was related to the woman's disability or gender identity. It is notable that the court's approach regarding the issue of reasonable accommodation closely follows that of the NIHR.

Name of the court: Netherlands Institute of Human Rights (NIHR)
Date of decision: 6 May 2019
Reference number: Opinion 2019-41
Link: https://mensenrechten.nl/nl/oordeel/2019-41
Brief summary: The applicant, a wheelchair user, wished to rent a holiday house for a family of four, accessible for wheelchair users. The owner of the holiday park, Landal GreenParks, replied that their accommodation for four people was not accessible for wheelchairs and that the only accessible accommodation was an eight-person bungalow at a substantially higher price. The NIHR held that Landal failed to meet its duty to provide reasonable accommodation: it should have looked for a solution more actively together with the applicant. The applicant's request had not been transmitted to the Landal team specifically in charge of accommodation for disabled visitors. While the NIHR considered that in this case Landal had not acted in conformity with the DDA, it commended the existence of the special team and considered that this could be seen as the implementation of the duty, laid down in Article 2a DDA, to gradually improve accessibility for people with disabilities.

Name of the court: Netherlands Institute for Human Rights (NIHR)
Date of decision: 20 May 2019
Reference number: Opinions 2019-45, 2019-46 and 2019-47
Link: https://mensenrechten.nl/nl/oordeel/2019-45
Brief summary: The applicants claimed discrimination on the ground of chronic illness/disability because several local train companies operated trains without toilets. The applicants suffered from chronic illnesses as a result of which they required immediate access to a toilet when travelling by train. The NIHR found that the train companies had not acted in contravention of the DDA. It stated that the reasonable accommodation to be made on public transport were exhaustively listed in the Decree on the accessibility of public transport (*Besluit toegankelijkheid van het openbaar vervoer*) and did not include the availability of toilets. In addition, the NIHR stated that the train companies had not acted in contravention of the duty to gradually improve accessibility for people with disabilities (Article 2a DDA), as they had sufficiently substantiated that to install toilets in the trains would have meant a disproportionate burden. The Opinions confirm the NIHR's stance, first expressed in Opinions 2018-55 and 2018-56, that it is competent to receive individual complaints relating to the implementation of Article 2a DDA. The NIHR furthermore made use of its competence to issue a recommendation, as it advised the local authorities of Gelderland province to include the availability of toilets in future concessions for train companies.

12.3 Cases brought by Roma and Travellers

Name of the court: District court of The Hague
Date of decision: 10 January 2019
Reference number: ECLI:NL:RBDHA:2019:76
Link: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2019:76
Brief summary: The Woonpartners foundation had won a public contract with the municipality of Waddinxveen for the allocation and management of caravan sites. In 2017 Woonpartners informed several Travellers living on caravan sites that their rental contracts would be terminated and they would be required to move to a different location. In January 2018 the NIHR stated in an Opinion that Woonpartners had acted in violation of the GETA

because the alternative accommodation offered to the Traveller families did not meet the requirements of their lifestyle and culture (NIHR Opinion 2018-9). Following this Opinion Woonpartners sought an injunction from the District Court of The Hague to terminate the rental agreements with the Travellers and make them leave the caravan site. The court, in line with the NIHR, found that the termination of the rental contracts in the absence of adequate alternative accommodation would be a contravention of Article 14 read together with Article 8 ECHR and the injunction was denied. In the judgment the district court expressly states that the authorities have a positive obligation to protect Traveller culture and facilitate the lifestyle of Travellers. It also accepted the Travellers' statements that the proposed 'caravan homes' did not meet the requirements of this lifestyle, as they did not have wheels and were built of stone instead of wood.

Name of the court: District court North-Holland
Date of decision: 22 May 2019
Reference number: ECLI:NL:RBNHO:2019:4463
Link: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNHO:2019:4463
Brief summary: The claimant owned a caravan located at a designated Travellers' site, which he rented from Woonwagenstandplaats Kennemerland (hereafter Wsk), a private organisation endowed with the management of several caravan sites in the region of Haarlem. The claimant wished to sell his caravan and asked Wsk to sell the caravan site to him, as the availability of the site would significantly increase the value of the caravan. Wsk refused on the grounds that it was bound to prioritise potential tenants from specified other caravan sites within the region. The court found that this prioritisation aimed to implement the new national policy aimed at the protection of Traveller culture, and that Wsk had rightfully refused to sell the site to the claimant. In the court's view the positive obligation under Article 14 read together with Article 8 ECHR to protect Traveller culture did not entail an obligation to protect the claimant's ability to gain capital from selling his caravan.

Name of the court: Netherlands Institute for Human Rights
Date of decision: 28 October 2019
Reference number: Opinion 2019-111
Link: https://mensenrechten.nl/nl/oordeel/2019-111
Brief summary: The applicant wished to live on a caravan site and claimed discrimination because the municipality could not tell him when a site would become available. The NIHR found no discrimination because the municipality could substantiate that it was in the process of inventarising the need for caravan sites and organising for additional sites to be made available. The process was expected to take three to four years, which was less than the six to seven years average waiting time for people in need of regular social housing.

Name of the court: Netherlands Institute for Human Rights
Date of decision: 2 December 2019
Reference number: Opinion 2019-126
Link: https://mensenrechten.nl/nl/oordeel/2019-126
Brief summary: Discrimination on the ground of race because the municipality of Nijmegen failed to inventarise the need for caravan sites and did not take action to make sufficient sites available. The NIHR found that the municipality's housing policy did not offer housing opportunities for Travellers at a level as equal as possible to those offered to people in need of regular social housing.

Name of the court: Netherlands Institute for Human Rights
Date of decision: 13 December 2019
Reference number: Opinions 2019-130 and 2019-131
Link: https://mensenrechten.nl/nl/oordeel/2019-130
Brief summary: Independer Services, a company offering car insurance for different insurance providers, directly discriminated against a woman on the ground of race by

refusing to consider her for insurance because she lived on a caravan site (Opinion 2019-130). The insurance provider itself did not act discriminatorily (Opinion 2019-131).

Name of the court: Netherlands Institute for Human Rights
Date of decision: 17 December 2019
Reference number: Opinions 2019-132 and 2019-133
Link: https://mensenrechten.nl/nl/oordeel/2019-132
Brief summary: No discrimination on the ground of race because the very specific housing wishes of the applicant, which could not be accommodated by the municipality, did not relate to his identity as a Traveller (Opinion 2019-132). In a related complaint against a housing corporation the NIHR found that there was no ground to assume that the corporation had taken insufficient measures to guarantee the availability of caravan sites (Opinion 2019-133).

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: **The Netherlands**
Date: **31 December 2019**

Title of the Law: General Equal Treatment Act Abbreviation: GETA Date of adoption: 2 March 1994 Entry into force: 1 September 1994 Latest relevant amendments: 1 November 2019 Web link: http://wetten.overheid.nl/BWBR0006502 Grounds covered: Race, religion & belief, political opinion, hetero- or homosexual orientation, sex (including gender), nationality and civil (or marital) status Civil Material scope: Employment relationships (both civil and public), occupational training and education, goods and services (including general education) + liberal professions Principal content: Prohibition of direct and indirect discrimination
Title of the Law: Disability Discrimination Act Abbreviation: DDA Date of adoption: 3 April 2003 Entry into force: 1 December 2003 Latest relevant amendments: 14 June 2016 Web link: http://wetten.overheid.nl/BWBR0014915 Grounds covered: Disability and chronic disease Civil Material scope: Employment relationships (both civil and public), occupational training and education + liberal professions + goods and services (including general education) Principal content: Prohibition of direct and indirect discrimination
Title of the Law: Age Discrimination Act Abbreviation: ADA Date of adoption: 17 December 2003 Latest relevant amendments: 10 July 2014 Entry into force: 1 May 2004 Web link: http://wetten.overheid.nl/BWBR0016185 Grounds covered: Age Civil Material scope: Employment relationships (both civil and public), occupational training and education + liberal professions Principal content: Prohibition of direct and indirect discrimination

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: **The Netherlands**
Date: **31 December 2019**

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	4.11.1950	31.8.1954	No	Yes	Yes
Protocol 12, ECHR	4.11.2000	28.7.2004	No	Yes	Yes
Revised European Social Charter	23.1.2004	3.5.2006	No	Yes	Yes
International Covenant on Civil and Political Rights	25.6.1969	11.12.1978	No	Yes	Yes
Framework Convention for the Protection of National Minorities	1.2.1995	16.2.2005	No	NA	Yes
International Covenant on Economic, Social and Cultural Rights	25.6.1969	11.12.1978	No	No	Yes
Convention on the Elimination of All Forms of Racial Discrimina-tion	24.10.1966	10.12.1971	No	Yes	Yes
ILO Convention No. 111 on Discriminatio n	unknown	15.3.1973	No	NA	Yes

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Rights of the Child	26.1.1990	6.2.1995	No	No	Yes
Convention on the Rights of Persons with Disabilities	30.3.2007	14.6.2016	No	No	Yes

GETTING IN TOUCH WITH THE EU

In person

All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at: https://europa.eu/european-union/contact_en.

On the phone or by email

Europe Direct is a service that answers your questions about the European Union. You can contact this service: – by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls), – at the following standard number: +32 22999696, or – by email via: https://europa.eu/european-union/contact_en.

FINDING INFORMATION ABOUT THE EU

Online

Information about the European Union in all the official languages of the EU is available on the Europa website at: https://europa.eu/european- union/index_en.

EU publications

You can download or order free and priced EU publications from: https://publications.europa.eu/en/publications . Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see https://europa. eu/european-union/contact_en).

EU law and related documents

For access to legal information from the EU, including all EU law since 1952 in all the official language versions, go to EUR-Lex at: http://eur- lex.europa.eu.

Open data from the EU

The EU Open Data Portal (http://data.europa.eu/euodp/en) provides access to datasets from the EU. Data can be downloaded and reused for free, for both commercial and non-commercial purposes.

Publications Office
of the European Union